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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC. and TENNECO OIL COMPANY,

Appellants,

—vs.—

DIRECTOR, DIVISION OF TAXATION,
NEW JERSEY DEPARTMENT OF THE TREASURY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Due Process, Commerce, and Equal Protection Clauses of the United States Constitution permit a State to define the taxable net income of a multistate corporation to include income contributed by an exclusively out-of-state business activity but to exclude associated costs incurred solely on account of that out-of-state activity.

2. Whether the taxation by a State of the amount of windfall profit tax incident to out-of-state oil production constitutes the effective imposition of an extraterritorial severance or excise tax in violation of the Due Process and Commerce Clauses of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to this proceeding are appellants, Texaco Inc. and Tenneco Oil Company, and appellee, Director of the Division of Taxation, New Jersey Department of the Treasury. Pursuant to Rule 28.1 of the Rules of the Court, lists naming the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of appellants Texaco Inc. and Tenneco Oil Company are set forth in Appendix G to this Jurisdictional Statement.

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TEXACO INC. and TENNECO OIL COMPANY,

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—VS.—

DIRECTOR, DIVISION OF TAXATION,
NEW JERSEY DEPARTMENT OF THE TREASURY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Texaco Inc. ("Texaco") and Tenneco Oil Company ("Tenneco") appeal from the final judgment of the Supreme Court of New Jersey, dated June 22, 1987, holding that the New Jersey Corporation Business Tax Act, N.J. Stat. Ann. §§ 54:10A-1 *et seq.* (West 1986), as construed and applied, is not repugnant to the Due Process Clause, the Commerce Clause, or the Equal Protection Clause of the United States Constitution. Similar appeals have been docketed on behalf of eleven other parties.[1]

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1 These parties are Amerada Hess Corporation, Atlantic Richfield Company, Conoco Inc., Cities Service Company, Exxon Corporation, Phillips Petroleum Company, Chevron U.S.A. Inc., Mobil Oil Corporation, Union Oil Company of California, Gulf Oil Corporation, and Shell Oil Company (referred to collectively as the "Amerada Hess appellants"). Plaintiff-appellant below Diamond Shamrock Corporation has not appealed to this Court.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App. 1)[2] is reported at 107 N.J. 307, 526 A.2d 1029. The opinion of the Appellate Division of the Superior Court of New Jersey (App. 32) is reported at 208 N.J. Super. 201, 505 A.2d 186. The opinions of the Tax Court of New Jersey (App. 39, 45) are reported at 7 N.J. Tax 51 and at 7 N.J. Tax 275.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 22, 1987 (App. 1).

Notices of Appeal to this Court were timely filed with the Supreme Court of New Jersey on behalf of Texaco and Tenneco on August 21, 1987 (App. 56, 59). This appeal is being docketed in this Court within 90 days from the entry of judgment below.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2). *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution are Article I, Section 8, Clause 3 ("Commerce Clause"), and Amendment XIV, Section 1 ("Due Process Clause" and "Equal Protection Clause"). They are set forth at App. 62.

The relevant provisions of the New Jersey Corporation Business Tax Act (1945) (the "CBT Act"), as amended, N.J. Stat. Ann. §§ 54:10A-1 *et seq.* (West 1986), are set forth at App. 62.

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2 "App." refers to the Appendix to this Jurisdictional Statement.

The relevant provisions of the Crude Oil Windfall Profit Tax Act of 1980 (the "WPT Act"), 26 U.S.C. §§ 4986 *et seq.*, are set forth at App. 65.

HOW THE FEDERAL QUESTIONS WERE RAISED

Appellants Texaco and Tenneco first raised the constitutional questions presented herein in the complaints filed with the Tax Court of New Jersey (Tex. Jt. App. 61, 73).[3] Texaco and Tenneco presented arguments on the constitutional questions in briefs submitted to the Tax Court of New Jersey and in their briefs filed with the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey.[4]

The New Jersey Supreme Court considered and expressly rejected the constitutional claims (App. 30).

STATEMENT OF THE CASE

Appellants Texaco and Tenneco, like the Amerada Hess appellants, are vertically integrated oil and gas companies, engaging in all aspects of the oil business, including exploration, production, refining, transportation, distribution, and marketing (App. 2). Since no oil is produced in New Jersey, appellants do not engage in that aspect of the oil business there; all oil production activities are wholly performed in

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3 "Tex. Jt. App." refers to the Joint Appendix for Plaintiffs-Appellants Texaco and Tenneco filed with the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey. *See* N.J. Rule 2:12-11, which provides that a certified "appeal shall be submitted [to the Supreme Court of New Jersey] on the briefs, appendices and transcripts filed with the Appellate Division."

4 Separate briefs were filed in the Appellate Division by three groups of plaintiffs-appellants: (1) Texaco and Tenneco, (2) Amerada Hess Corporation, and (3) all the other plaintiffs-appellants (hereinafter referred to collectively as "Atlantic Richfield Company, *et al.*"). The constitutional questions were presented to the Appellate Division and New Jersey Supreme Court in the Joint Brief for Plaintiffs-Appellants Atlantic Richfield Company, *et al.* at 62-76, Joint Brief for Plaintiffs-Appellants Texaco and Tenneco at 5, and Brief for Amerada Hess at 37 n.28.

other States (App. 2; Tex. Jt. App. 64, 76). Both Texaco and Tenneco, however, market petroleum products and engage in other activities in New Jersey (Tex. Jt. App. 64 to 65, 76 to 77).

As domestic oil producers doing business in New Jersey, appellants are subject to both the Federal Windfall Profit Tax on domestic crude oil ("WPT") and the New Jersey Corporation Business Tax ("CBT"), which imposes a tax upon net income.[5] The constitutional questions presented herein involve New Jersey's application of a provision of the CBT Act effectively to increase each appellant's apportionable net income for State tax purposes by the amount of WPT incurred.

This litigation began upon the assessment of a deficiency in each of the appellants' 1980 CBT returns by the Director of the Division of Taxation, New Jersey Department of the Treasury. Notices were sent to Texaco on July 19, 1982, and to Tenneco on April 28, 1983 (Tex. Jt. App. 71, 86). These assessments were based upon the Director's determination that a provision of the CBT Act, N.J. Stat. Ann. § 54:10A-4(k)(2)(C) (West 1986), required each appellant to add back its Federal deduction for WPT to its Federal net income in order to determine its net income for State CBT purposes.[6] The assessments in this regard were for $987,606, plus interest and penalties, as to Texaco,[7] and $95,592, plus interest and penalties, as to Tenneco (Tex. Jt. App. 71, 86).[8] Appellants protested these assessments on the grounds that the WPT is not a tax "measured by profits or income" and thus subject to the add-back provision of the CBT Act, N.J. Stat. Ann. § 54:10A-4(k)(2) (West 1986). The Director denied these protests (Tex. Jt. App. 69, 81).

5 The general discussion of the WPT Act and the CBT Act presented in the Jurisdictional Statement of the Amerada Hess appellants is incorporated herein by reference.

6 The CBT is an annual tax upon a corporation's "entire net income" (or in the alternative, upon its "entire net worth"), subject to apportionment in the case of a multistate business. N.J. Stat. Ann. § 54:10A-5 (West 1986). The entire net income subject to the CBT is essentially the corporation's net income for Federal income tax purposes, as adjusted to reflect the add-back of certain federal deductions: "Entire net income shall be determined without the exclusion, deduction, or credit of: . . . [t]axes paid or accrued to the United States on or measured by profits or income." N.J. Stat. Ann. § 54:10A-4(k)(2)(C) (West 1986).

7 On April 12, 1987, Texaco filed for bankruptcy under Chapter 11 of the Bankruptcy Code of 1978, 11 U.S.C. §§ 101 *et seq.* Prior to this filing, and during the pendency of the proceedings below, Texaco paid the full amount of the deficiencies against it. Accordingly, this proceeding is, as to Texaco, an action for a refund of an amount paid by it and thus is not within the scope of the automatic stay provisions of 11 U.S.C. § 362.

8 The deficiencies resulting from the treatment of WPT on the 1980 CBT returns necessarily are relatively low, as the WPT was in effect for only a portion of that year. The deficiencies for subsequent CBT returns are significantly greater given the increased WPT liabilities for years after 1980, resulting from the full applicability of the WPT in those years as well as the increased domestic production attributable to deregulation. The State has generally deferred action, pending the outcome of this litigation, on appellants CBT returns for subsequent years.

On May 6, 1983 and October 7, 1983, respectively, Texaco and Tenneco each filed a complaint in the Tax Court of New Jersey (Tex. Jt. App. 61, 73). The complaints challenged the deficiency assessments both on statutory grounds—that is, whether the WPT is a tax "on or measured by profits or income" within the scope of N.J. Stat. Ann. § 54:10A-4(k)(2)(C) (West 1986)—and on Federal constitutional grounds. Similar complaints were filed on behalf of each of the Amerada Hess appellants. On cross-motions for summary judgment and again upon reconsideration, the Tax Court rejected the challenges by Texaco, Tenneco, and the Amerada Hess appellants and affirmed the deficiency assessments as to each (App. 39, 45).

On the consolidated appeals of Texaco, Tenneco, and the Amerada Hess appellants, the Appellate Division of the Superior Court of New Jersey reversed. The court recognized at the outset "that the amount of [WPT] actually realized from each barrel of crude oil removed from the premises is significantly affected by factors unrelated to income or profit" (App. 35).

In addition, it emphasized that the object of the CBT is "net income" and that the concomitant purpose of N.J. Stat. Ann. § 54:10A-4(k)(2) (West 1986) is simply "to preserve undiluted for state taxation the same tax base upon which federal income taxes were computed" and not "to include legitimate business expenses" such as the WPT in the tax base (App. 36). Accordingly, it held, without reaching the constitutional questions presented, that "the WPT is not a tax on or measured by profits or income" within the meaning of N.J. Stat. Ann. § 54:10A-4(k)(2)(C) (West 1986) (App. 38).

On the certified appeal of the Director of the Division of Taxation, the Supreme Court of New Jersey reversed, ruling that the WPT is a tax "on or measured by profits or income" within the probable legislative intent of the CBT Act (App. 28). In doing so, the court rejected, *inter alia*, the contentions of the plaintiffs-appellants that the WPT was a tax on the removal of crude oil rather than on any real profits with respect thereto (App. 27 to 28).[9] The court made this determination despite the plain incidence of the WPT on the activity of removal,[10] and despite its own acknowledgment that the WPT "differed from the regular federal corporate income tax as it was imposed on production at the wellhead rather than on these integrated domestic producers' overall net profits or income ultimately calculated from gross sales and net profits as measured at the pump" (App. 5).[11]

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9 The term "windfall profit" is defined under the WPT Act as essentially the excess of the world market price for crude oil at the time of its removal over the price for such oil had it still been subject to regulation. *See* 26 U.S.C. § 4988. Accordingly, the term is one of art, not referring to any real profit *per se*. *See generally* Robison, *The Misnamed Tax: The Crude Oil Windfall Profit Tax of 1980*, 84 Dick. L. Rev. 589 (1980).

10 *See* 26 U.S.C. §§ 4986(a), 4988(a)-(c); 26 C.F.R. § 51.4986-1.

11 Though the court thus identified "gross sales and net profits . . . at the pump" as the measure of operating income, this is incorrect. The profitability of integrated oil companies such as Texaco and Tenneco cannot be determined simply by reference to gross sales or net profits (or losses) at the pump or elsewhere. However, the New Jersey Supreme Court's language is repeated herein to encompass broadly the many components of the unitary operating income of such companies.

The Supreme Court of New Jersey further held that its construction of the CBT Act to include WPT in New Jersey's apportionable tax base was not violative of the Due Process, Commerce or Equal Protection of the United States Constitution. As to the challenge under the Due Process Clause, the court apparently determined that the CBT is *prima facie* constitutional, since it subjects each appellant's "entire net income" tax base to a three-factor apportionment formula, and because the add-back provision of the CBT Act "only" denies a deduction from that tax base (App. 30 to 31). The court then rejected the challenge to its construction of the CBT Act under the Commerce and Equal Protection Clauses, based upon its assertion that plaintiffs-appellants were not denied a "deduction for the W.P.T." because of "the interstate nature of [their] businesses" but "because they produce crude oil and pay the W.P.T." (App. 31).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents fundamental constitutional issues as to State taxing power that this Court has not yet directly addressed. The resolution of these issues will affect not only the immediate controversy in this case—whether New Jersey properly may impose a tax on the amount of WPT imposed by the United States—but also broader questions as to the constitutional limits of State taxation of interstate activities in general.

Each of the challenges to New Jersey's construction and application of the CBT under the Due Process, Commerce, and Equal Protection Clauses of the United States Constitution presents a fundamental question as to the extent to which a State may enlarge the apportionable income base of a multistate business to include not only the interstate *income* of the business, but also a *value* intrinsic to a wholly out-of-state activity. In this case, that out-of-state activity is oil production, and the value sought to be taxed is a portion of the intrinsic value of oil upon its severance at the wellhead as measured by the amount of WPT attributable to that severance. However,

the implications of State taxation of values intrinsic to another State extend well beyond the context of oil production or even mineral production in general.[12] In any event, this Court has recognized that such intrinsic values are in themselves neither apportionable nor a measure of income. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 & n.12 (1980). By including within apportionable "income" the amount of WPT incurred by the corporate taxpayer, New Jersey seeks to tax those values no less than if it had imposed a tax directly on the severance value of minerals produced in other States or upon the severance taxes imposed by other States. Such a scheme for the effective taxation of extraterritorial values warrants this Court's constitutional scrutiny.

I. THE NEW JERSEY TAX AS APPLIED IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUES AND DISCRIMINATES AGAINST AN EXCLUSIVELY OUT-OF-STATE BUSINESS ACTIVITY IN VIOLATION OF THE DUE PROCESS, EQUAL PROTECTION, AND COMMERCE CLAUSES.

Appellants Texaco and Tenneco hereby adopt and incorporate herein all of the challenges to the New Jersey CBT Act, as construed and applied to them and to the Amerada Hess appellants, under the Commerce Clause, the Equal Protection Clause and the Due Process Clause of the United States Constitution, and all of the arguments made in support

12 Even in this immediate context, though, the questions presented are substantial. The collective WPT liability of domestic oil producers stands as a lucrative target for taxation by States, such as New Jersey, which cannot impose a tax directly upon crude oil severance values to the extent they are not properly reflected in the producers actual net incomes. Indeed, several other States have acted to disallow specifically a deduction for WPT in determining the apportionable "income" base subject to tax. *See, e.g.*, Iowa Code Ann. § 422.35(10) (West 1987 supp.); Minn. Stat. Ann. § 290.09(4)(c) (West 1987 supp.); S.C. Code Ann. § 12-7-700(4) (Law Co-op. 1986 supp.) (as construed in 1982 Op. Atty. Gen. No. 82-13); Wis. Stat. Ann. § 71.04(3) (West 1986 supp.).

thereof, set forth in the Jurisdictional Statement filed with this Court on behalf of the Amerada Hess appellants.[13] Therefore, the contentions set forth therein are not otherwise repeated herein. Appellants Texaco and Tenneco, however, submit further that the New Jersey CBT Act, as applied, violates the Due Process and Commerce Clauses of the United States Constitution for the additional reasons set forth herein.

II. THE NEW JERSEY TAX AS APPLIED IMPERMISSIBLY TAXES A VALUE INCIDENT TO AN OUT-OF-STATE ACTIVITY BEYOND THE EXTENT TO WHICH THAT VALUE IS REFLECTED IN THE TAXPAYER'S APPORTIONABLE NET INCOME, IN VIOLATION OF THE DUE PROCESS AND COMMERCE CLAUSES.

It is fundamental that the power of a State to tax interstate activities or businesses is restricted by the Commerce Clause and the Due Process Clause of the United States Constitution. As this Court has repeatedly stated: "Under both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders.' " *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)).

The determination of that income which is subject to taxation in a given State may be made by a proper application of the "unitary business/formula apportionment method," such that " 'the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs.' " *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460 (1959)). However, the power of a State thereby

13 *See* note 1, *supra*.

to allocate to itself a portion of a corporation's entire interstate income is not beyond scrutiny. That is, the constitutionality of a State's taxation of interstate values is not resolved merely by the State's purported application of a generally permissible apportionment formula.[14] *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-74 (1978).

It is fundamental that the allocation of a portion of interstate income to a State, whether pursuant to a permissible method of formula apportionment or otherwise, must not result in the impermissible taxation by that state of "extraterritorial values" in violation of the Due Process and Commerce Clauses. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 442 (1980). As Justice Holmes recognized, the apportionment of interstate income may only be used by a State to estimate "the true value of the things within it, when they are part of an organic system of wide extent that gives them a value above what they would otherwise possess." *Wallace v. Hines*, 253 U.S. 66, 69 (1920). Accordingly, this Court has set forth certain standards by which to consider the constitutionality of State taxation of "apportioned" income: Under the Due Process and Commerce Clauses, a State cannot tax income arising from an interstate business, even on a proportional basis, unless there is at least a " 'minimal connection, or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' " *Exxon Corp. v. Wisconsin Dep't of Revenue*, *supra*, 447 U.S. at 219-20 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, *supra*, 445 U.S. at 436-37); *and see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Thus, both the definition of

14 *But cf.* the rejection by the Supreme Court of New Jersey of appellants' due process contentions, based upon its determination that each corporation's "entire net income" was subject to a "three-factor apportionment formula" (App. 30 to 31).

that income subject to apportionment and the apportionment itself must be fairly made.[15]

Under these standards, the constitutionality of a State tax is determined not by the "formal language of the statute" but rather by its "practical effect." *Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. at 279. Moreover, a State tax which is "tailored," for example, effectively to distinguish between income or revenues for different types of businesses, is particularly subject to "the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Id.* at 289 n.15. *Accord Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 649 n.14 (1981) (Blackmun, J., dissenting).

New Jersey's construction of the add-back provision of its CBT Act to extend the scope of "net income" to include the amount of WPT imposed upon corporations such as these appellants—an item peculiar to the wholly extraterritorial activity of oil production—renders the CBT, in its application to them, such a "tailored tax" subject to this Court's strict scrutiny. Under such scrutiny, it is plain that the effect of the CBT as so imposed is to tax extraterritorial values.

The construction of New Jersey's add-back provision to require that an oil producer's "net income" include the amount of WPT incurred clearly extends the reach of the CBT to include not only the net income of the corporation as realized from its interstate activities, but also extraterritorial values attributable solely to the severance of oil and "realized," if at all, incident to that severance. The value upon which the WPT is assessed is simply an economic value, not income. Indeed, the value does not necessarily ever become recognized or realized as income from the severance or removal of crude oil

15 In addition, the Commerce Clause imposes the further requirement on State taxation of an interstate business that any such tax "not discriminate against interstate commerce." *Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. at 279.

from the property.[16] As the New Jersey Supreme Court acknowledged, despite its approval of the inclusion of WPT amounts in the "net incomes" of appellants, the WPT "differ[s] from the regular federal income tax as it [is] imposed on production at the wellhead rather than on these integrated domestic producers' overall net profits or income ultimately calculated from gross sales and net profits as measured at the pump" (App. 5).[17]

The WPT is, as is repeatedly recognized in the legislative history of its enactment, "an excise, or severance, tax" directed at the activity of domestic crude oil production and measured with reference to the appreciated value of oil at the wellhead. S. Rep. No. 96-394, 96th Cong., 2d Sess. 2 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 414; H.R. Rep. No. 96-304, 96th Cong., 2d Sess. 2 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 589; H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 92 (1980), *reprinted in* U.S. Code Cong. & Ad. News 642, 645. The New Jersey Supreme Court's characterization of the WPT amount as "income" under the CBT notwithstanding, the practical effect of increasing each appellant's apportionable net income base by that amount is plain: New Jersey has extended its taxing power beyond "net profits as measured at the pump" to include the intrinsic value of oil upon its severance in other States. This "practical effect" and "economic substance" are determinative, and are mitigated neither by New Jersey's designation of the WPT as a tax measured by "income" under the CBT Act nor by the method by which it is obtained, *e.g.*, through the disallowance of a deduction or otherwise. *See Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 405 (1984).

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16 For example, if a quantity of crude oil removed from the property were to be destroyed prior to sale, there clearly would be no recognized income as to that quantity of oil; however, the WPT would nevertheless be imposed on the value of that oil at its removal. *See* 26 U.S.C. §§ 4986(a), 4988(a)-(c).

17 *See* note 11, *infra*.

The validity of the CBT Act, as construed by the Supreme Court of New Jersey to include WPT within the scope of apportionable "net income," thus turns on whether New Jersey may properly tax a value intrinsic to the severance of oil from the ground beyond the extent to which that value is reflected in the "gross sales and net profits at the pump," that is, whether any such value may be taxed, if at all, by the several States on an apportionment basis or must be specifically allocated to the State of production. This issue is similar to that which remained unaddressed by the Court in *Exxon Corp. v. Wisconsin Dep't of Revenue*, *supra*.[18] Its resolution in this case, however, is plain from the subsequent opinion of this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

In *Commonwealth Edison Co. v. Montana*, this Court held that Montana could properly impose a severance tax on coal mined within the State based upon a percentage of the contract sales price. In doing so, the Court emphasized that the intrinsic value of a mineral incident to its severance from the ground, as opposed to any net income attributable to its ultimate sale, is not subject to taxation in any State other than the situs of production:

> As the Montana Supreme Court noted, "there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana." Nor is there any question here regarding apportionment or po-

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18 There, the Court held that a State could tax the apportioned income of an integrated oil company which the company had classified as "exploration and production income" and had argued was subject to tax only in the State of production. The Court noted, however, that: "Since appellee determined that income derived from the sale of crude oil and gas at the wellhead to third parties must, under the state statute, be allocated to the situs State and excluded from the reach of the apportionment statute, we need not address the issue of whether the Due Process Clause would require such allocation rather than apportionment," 447 U.S. at 226 n.10, and "we do not here address the issue of whether the Commerce Clause requires allocation of income derived from the sale of crude oil and gas at the wellhead to third parties to the situs State rather than apportionment." 447 U.S. at 227 n.11.

> tential multiple taxation, for as the state court observed, "the severance can occur in no other state" and "no other state can tax the severance."
>
> . . . .
>
> The entire value of the coal, before transportation, originates in the [situs] State [453 U.S. at 617, 624 (citations omitted).]

A necessary corollary of the Court's decision is that a State may not "tax the severance" indirectly by imposing any tax the "operating incidence" of which effectively falls on out-of-state mineral production or the effective measure of which is a percentage of the value of minerals extracted in another State. 453 U.S. at 617, 626.

The recognition of certain items as beyond the reach of multijurisdictional apportionment is not limited to the context of resource production and severance. *See, e.g., ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982), both of which held that a State may not tax, even through apportionment, the intangible income received by a parent corporation from a subsidiary with no other connection to the taxing State. In this case, where it is the apportionability of an intrinsic *value* incident to a wholly extraterritorial activity, rather than the apportionability of a certain item of realized *income*, that is in issue, the limitations on the reach of formula apportionment apply with even greater force.[19]

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19 *Cf. Exxon Corp. v. Wisconsin Dep't of Revenue*, *supra*, where the Court rejected Exxon's contention that exploration and production income was not subject to apportionment among the several States. The Court noted that "[i]n order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to the sale of petroleum products in that State.' " 447 U.S. at 223 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, *supra*, 445 U.S. at 439). The Court distinguished, however, the *income* tax sought to be imposed by Wisconsin from a severance tax, that is, a tax "directed at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities." 447 U.S. at 228 n.12. While New Jersey similarly designates its tax as one directed at "net income," the "name, description or characterization" of the tax by New Jersey does not mitigate its "practical impact." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste v. Louisiana Dep't of Conservation*, 263 U.S. 545, 550 (1924)); *see Complete Auto Transit, Inc. v. Brady*, *supra*, 403 U.S. at 279. Rather, it is plain that the CBT, by taxing the WPT amount in addition to any "windfall profit" reflected in each appellant's net income, is directed, in part at least, at the intrinsic *value* of oil at the wellhead.

A tax upon a value wholly incident to a discrete extraterritorial activity is tantamount to a tax on that activity itself. Such a value simply cannot be subject to multistate apportionment consistent with the restrictions of the Due Process and Commerce Clauses. *See Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, ____U.S. ____, 107 S.Ct. 2810, 2822 (1987). The intrinsic value of oil at the wellhead, which is the subject of the WPT, is directly attributable to the severance and removal of that oil, a "separate activity" conducted wholly within the oil producing State "that no other State has jurisdiction to tax." *Id.*; *see also* 107 S.Ct. at 2824-25 (Scalia, J., concurring in part and dissenting in part).[20] New Jersey may not effectively create such jurisdiction by taxing a tax levied on the "separate activity" of oil extraction.

Moreover, the extraterritorial impact of the CBT that results from the expansion of the apportionable tax base under the CBT Act to include a value distinct from operating income and wholly incident to the out-of-state activity of oil extraction and removal is distorted even further by the lack of external consistency in the apportionment factors applied to this value. As this Court has recognized, the requirement of external consistency in an apportionment formula is that "the factor or

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20 "Where, however, tax apportionment is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States, that apportionment principle is not applicable; there is simply no unitary figure or event to apportion."

factors used . . . must actually reflect a reasonable sense of how income is generated." *Container Corp. of America v. Franchise Tax Board*, *supra*, 463 U.S. at 169. In this case, however, New Jersey has applied the three factors normally used to allocate only operating income[21] to apportion a tax base consisting, in fact, of each appellant's operating income *plus* the amount of its WPT liability. The addition of this distinct value to each appellant's apportionable tax base, if proper at all, thus requires a correlative adjustment to the apportionment formula used in order to reflect the extraterritorial nature of this value. Indeed, given the absence of any "necessary correlation" between traditional formula apportionment factors and the intrinsic value of oil at the wellhead, as incorporated in each appellant's apportionable tax base through the add-back of its WPT,[22] it is impermissible for New Jersey simply to include such a substantial value, distinct from operating income, in the tax base and "to apportion it on the basis of factors that are used to allocate operating income." *Mobil Oil Corp. v. Commissioner of Taxes*, *supra*, 445 U.S. at 458 n.11, 459 (Stevens, J., dissenting). To do so can only result in the taxation of out-of-state values through an overstatement of New Jersey's taxable share of the value represented by WPT, if, indeed, that value is subject to taxation by New Jersey at all.

In sum, the application of the add-back provision to increase the apportionable "net income" under the CBT Act by the amount of WPT is plainly a State tax on the WPT itself,

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21 That is, receipts (*e.g.*, from sales), payroll, and property. *See* N.J. Stat. Ann. § 54:10A-6 (West 1986).

22 *Cf.*, *e.g.*, *Atlantic Richfield Co. v. Alaska*, 705 P.2d 418, 426 (Alaska 1985), *appeal dismissed*, ____ U.S. ____, 106 S.Ct. 774 (1986), where the court held that income from oil and gas production could be allocated specifically to the situs of production. In doing so, the court emphasized that the traditional formula apportionment factors (*i.e.*, property, payroll, and sales) do not reflect the origins of the predominant income-producing element of oil production: "the value of the oil and gas reserves in the ground."

which, in practical effect and economic substance, amounts to no less than a tax on the very value that is taxed by the WPT.[23] This value, the intrinsic value of oil at the wellhead, is properly allocable solely to the particular situs of oil production; to the extent that it is realized in an appellant's income and thus subject to apportionment in New Jersey, it is reflected in the "gross sales and net profits as measured at the pump" (App. 5). As the New Jersey Supreme Court there acknowledged, however, the WPT is not directed at this income; therefore, neither is the practical impact of New Jersey's taxation of the WPT. Accordingly, the CBT Act as here applied violates both the Due Process and Commerce Clauses by taxing an extraterritorial value wholly apart from any income that properly might be apportionable among the several States.

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23 The practical impact of a tax on WPT is plainly directed at a portion of the gross value of oil at the wellhead, that is, the excess of its "removal price" (essentially the world market price) over its "adjusted base price." 26 U.S.C. § 4988(a), (c)(1)-(3). However, even if the effect of the CBT as applied could be considered a tax on an additional amount of income, rather than on this intrinsic value of oil upon its severance, New Jersey's method of increasing its apportionable income base is constitutionally defective. As contended below, New Jersey, by singling out the WPT—a cost of production and thus a part of the costs of goods sold—while permitting no allowance therefor in computing the "entire net income" subject to apportionment, has effectively *apportioned* to itself appellants' gross receipts while *specifically allocating* a substantial cost incurred in connection therewith (*i.e.*, the WPT) to other jurisdictions (Joint Brief for Plaintiffs-Appellants Atlantic Richfield Company, *et al.*, at 65-67). Such a "theoretically incommensurate" combination of apportionment and separate accounting is impermissible and causes an overstatement of extraterritorial values in each appellant's "net income" apportioned to New Jersey. *See Mobil Oil Corp. v. Commissioner of Taxes*, *supra*, 445 U.S. at 444.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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September 18, 1987

APPENDICES

Appendix A

Opinion and Judgment of the Supreme Court of New Jersey (June 22, 1987)

SUPREME COURT OF NEW JERSEY
A-61/62/63/64/65/66/67/68/69/70/71
September Term 1986

AMERADA HESS CORPORATION, ATLANTIC RICHFIELD COMPANY, CONOCO INC., CITIES SERVICE COMPANY, EXXON CORPORATION, PHILLIPS PETROLEUM COMPANY, CHEVRON U.S.A. INC., MOBIL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, SHELL OIL COMPANY, DIAMOND SHAMROCK CORPORATION, TENNECO OIL COMPANY, and TEXACO, INC.,

Plaintiffs-Respondents,

—v.—

DIRECTOR, DIVISION OF TAXATION,

Defendant-Appellant.

Argued November 18, 1986--Decided June 22, 1987

On certification to the Superior Court,
Appellate Division, whose opinion is
reported at 208 *N.J. Super.* 201 (1986).

The opinion of the court was delivered by KING, *P.J.A.D.* (temporarily assigned).

This case concerns the interpretation of seven words in the New Jersey Corporation Business Tax (C.B.T.), *N.J.S.A.* 54:10A-1 to -40. These seven words, "on or measured by profits or income," determine whether the Federal Windfall

Profit Tax on Domestic Crude Oil (W.P.T.), 26 *U.S.C.A.* § 4986 to § 4998, is excludable in computing the oil company plaintiffs' net income taxable under our C.B.T.

Entire net income is the base on which New Jersey's C.B.T. is assessed. The entire net income base for the C.B.T. is similar but not identical to the tax base used for federal corporate income purposes. Adjusted gross income for federal tax purposes is calculated by deducting certain federal and State taxes paid by the corporation. New Jersey law specifically requires that certain amounts paid in federal taxes be added back into the tax base for calculation of the C.B.T. This is called the "add-back" provision. Thus, the base for federal corporate income tax is not identical to the "net income" base on which the C.B.T. is assessed. This difference is at the core of the dispute before us.

The fourteen plaintiffs in this case are vertically integrated oil companies that engage in every aspect of the crude oil business, including exploration, development, refining, manufacturing and marketing. None of the plaintiffs has oil producing properties in New Jersey, but all conduct other aspects of their business within this State. In this case the oil companies urge that they can exclude the amount they paid in the Federal Windfall Profits Tax on Domestic Crude Oil (W.P.T.), I.R.C. §§ 4986 to 4998, from the calculation of their net taxable income for purposes of the New Jersey's Corporation Business Tax (C.B.T.), *N.J.S.A.* 54:10A-1 to -40. The Director of the Division of Taxation disagrees and argues that these payments are not excludable.

The C.B.T. is a fairly allocated franchise or excise tax levied on business corporations for the privilege of "doing business, employing or owning capital or property, or maintaining an office" in New Jersey. *N.J.S.A.* 54:10A-2, 10A-8. The tax basis for the C.B.T. is "entire net income" which is defined in N.J.S.A. 54:10A-4(k) as

> total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from

> both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed *prima facie* to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax.

However, subsection (k) also provides that

> (2) Entire net income shall be determined without the exclusion, deduction or credit of:
>
> * * * *
>
> C) Taxes paid or accrued to the United States *on or measured by profits or income* * * *.
>
> [*N.J.S.A.* 54:10A-4(k)(2)(C) (emphasis supplied).]

The crucial issue in this case is whether the W.P.T. is a tax "on or measured by profits or income" within the intent of *N.J.S.A.* 54:10A-4(k)(2)(C). If the W.P.T. is a tax "on or measured by profits or income" within the intent of the C.B.T., the Director was correct in disallowing its exclusion from the net income base for C.B.T. purposes. At the time the net income provision was added to the corporation business tax in 1958, *L.* 1958, *c.* 5, the W.P.T. did not exist. *F.W. Woolworth Co. v. Director, Div. of Taxation*, 45 *N.J.* 466, 473 (1965). Therefore the drafters and adopters of this section of the C.B.T. could not have harbored any specific legislative intent on includability of the W.P.T., which became effective in 1980, in the tax base.

The federal "windfall profits tax on domestic crude oil," I.R.C. §§ 4986-4998 (1980), was imposed after President Carter announced that he would gradually decontrol domestic crude oil prices beginning in June 1979. The price controls originated with President Nixon's Wage and Price Controls in August 1971. The Energy Policy Act made them mandatory through May 1977 and gave the President discretion to remove

them until 1981. *See* H. R. Rep. No. 306 96th Cong. 1st Sess. 1980 U.S. Cong. & Ad. News 1980, 591. 42 *U.S.C.A.* § 6201, and scattered sections to § 6392. Because of the shortage of crude oil for American markets caused by supply cut-backs by Iran and other international producers, President Carter decided to exercise his authority and decontrol prices during 1979. The background of the W.P.T. was described by Justice Powell in *United States v. Ptasynski*, 462 *U.S.* 74, 76-77, 76 *L.Ed.* 2d 427 (1983).

> In 1979, President Carter announced a program to remove price controls from domestic oil by September 30, 1981. [See H. R. Rep. No. 96-304, 5 (1979) reprinted in 1980 U.S. Cong. & Ad. News 593]. By eliminating price controls, the President sought to encourage exploration for new oil and to increase production of old oil from marginal economic operations. See H. R. Doc. No. 96-107, 2 (1979). He recognized, however, that deregulating oil prices would produce substantial gains (referred to as "windfalls) for some producers. The price of oil on the world market had risen markedly, and it was anticipated that deregulating the price of oil already in production would allow domestic producers to receive prices far in excess of their initial estimates. See *ibid*. Accordingly, the President proposed that Congress place an excise tax on the additional revenue resulting from decontrol.

Congress responded by enacting the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, 26 *U.S.C.* § 4986 *et seq*. (1976 ed., Supp V) [I.R.C. §§ 4986 to 4998]. The Act divides domestic crude oil into three tiers and establishes an adjusted base price and tax rate for each tier. See §§ 1986, 1989, and 4991. The base prices generally reflect the selling price of particular categories of oil under price controls, and the tax rates vary according to the vintages and types of oil included within each tier. See Joint Committee on Taxation, General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, 96th Cong., 26-36 (Comm. Print 1981). The House Report explained

> that the Act is "designed to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price." H. R. Rep. No. 96-304, at 7 [reprinted in 1980 U.S. Cong. & Ad. News 594]; see S. Rep. No. 96-394, p. 6 (1979) [reprinted in 1980 U.S. Cong. & Ad. News 417]

Thus, the windfall tax was imposed on the incremental income attributable to decontrol of domestic oil prices. This incremental income was created by the cartel-generated international oil shortages, which had driven up international oil prices. It was attributable to world market conditions designed to limit supply and to raise prices; it was not generated by any infusions of capital or the expenditure of creative entrepreneurial energy by the domestic oil producers. Thus, there emerged the concept of taxing "windfall profits," or profits not earned by traditional economic activity as known to our economy. In mid-1979 just before the beginning of President Carter's decontrol of oil prices, the controlled price of "old" oil was $5.86 a barrel, the controlled price of "new" oil was $13.06 a barrel, and the uncontrolled world price was approaching $20 per barrel. The world price eventually reached $30 per barrel.

The W.P.T. differed from the regular federal corporate income tax as it was imposed on production at the wellhead rather than on these integrated domestic producers' overall net profits or income ultimately calculated from gross sales and net profits as measured at the pump. This method of taxation creates the dispute at hand—whether the W.P.T. is "on or measured by profits or income" or is another species of tax. As noted, the basic measure of the windfall profit was the difference between the uncontrolled and controlled price of a barrel of crude oil at the point the oil was removed from the producing property. The actual tax rate varied from 30% to 70%, I.R.C. § 4987, and was determined by the length of time the property had been productive. Because oil from newly-productive property was taxed at a lower rate than oil from

older wells, tax differentials motivated exploration for and discovery of new oil-producing properties by the domestic companies, thus reducing dependency on foreign oil.

A net income limitation (N.I.L.) also was enacted by Congress to insure that the W.P.T would not be imposed on a company when the costs of production exceeded the income from a particular property. I.R.C. § 1988. The N.I.L. placed a ceiling on the taxable windfall profit equal to 90% of the net income from a barrel of oil, netting barrels sold at a profit with barrels selling at a loss. I.R.C. § 4988(b). The W.P.T. was imposed on the lesser of the windfall profit or 90% of the net income per barrel. All fourteen respondent oil companies used the N.I.L. to calculate their W.P.T. liability for the taxable years under scrutiny, 1980 and 1981. The use of the N.I.L. resulted in a total savings of $1,685,465,293 to these taxpayers over the tax that would have applied if the wellhead assessment had stood alone without the N.I.L. The W.P.T. is a deduction for federal income tax purposes. I.R.C. §§ 164(a)(4), 1988(b). The W.P.T. remains effective until December 1990 or until $227.3 billion is realized, whichever is later. I.R.C. § 4990.

In the spring of 1983 the fourteen respondent oil companies filed complaints in the New Jersey Tax Court challenging either assessments for deficiencies or denial of refund claims in respect of all of their 1980, and in five instances their 1981, C.B.T. returns. The Director of the Division of Taxation in each case had denied deduction of the W.P.T. from the C.B.T. "net income" base. For each denial, the Director had relied on the position of the New York State Department of Taxation and Finance, which ruled in May 1982 that the W.P.T. was a measure of profits and not excludable for purposes of determining income under the New York Corporate Franchise Tax, which is similar to the C.B.T. *TSI-M* 82 (227) *CCH State Tax Rptr.* (N.Y.) ¶ 9-909. The New York administrative ruling, set out in the margin in full, concluded: "As the windfall profit

tax is measured by profit the modification is required and the tax must be added to entire net income."[1]

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1 Memorandum *TSB-M*-82(22)C.

Technical Services Bureau, Taxpayer Services Division, Department of Taxation and Finance, Corporation Tax, July 12, 1982.

Opinion of Counsel

Deductibility of Federal Windfall Profits Tax under Article 9-A
William A. Craven, Director — May 28, 1982
Audit Division

Your memorandum of November 14, 1980 to Saul Heckelman requested an opinion as to whether the windfall profit tax imposed by Chapter 45 of the Internal Revenue Code of 1954, as amended, is a modification increasing the entire net income base for the Article 9-A franchise tax of subject taxpayers.

Section 208.9 of the Tax Law provides in pertinent part that:

> "(b) Entire net income shall be determined without the exclusion, deduction or credit of:
>
> (1) the amount of any specific exemption or credit allowed in any law of the United States imposing any tax on or measured by the income of corporations,
>
> • • • • •
>
> (3) taxes on or measured by profits or income paid or accrued to the United States, . . ."

Section 4986(a) of the Internal Revenue Code provides that:[2]

> "An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period."

The tax is also characterized in the conference report as a severance tax.

Section 4987(a) thereof states that the tax is an applicable percentage of windfall profit; windfall profit is defined in section 4988(a) thereof as follows:

> "General Rule. For purposes of this chapter, the term 'windfall profit' means the excess of the removal price of the barrel of crude oil over the sum of—
>
> (1) the adjusted base price of such barrel, and
>
> (2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c)."

Section 4988 thereof places a net income limitation on windfall profit.

Section 164(a)(5) of the Internal Revenue Code, as amended by Public Law 96-223, allows a deduction from federal adjusted gross income for the amount of windfall profit tax; other deductible taxes allowed under section

The oil companies and the Director filed cross-motions for summary judgment in the Tax Court. Judge Conley granted summary judgments for the Director. *Amerada Hess v. Director, Div. of Taxation*, 7 *N.J. Tax* 51 (1984) (*Amerada I*). He concluded that our "legislature surely perceived the windfall profits tax to be a tax on profits or income and felt no need to amend the corporation business tax for that reason." *Id.* at 56. In holding that the sum of the W.P.T. must be included in the "net income" base, Judge Conley accepted the Director's contention that the Legislature did not have to amend the C.B.T. after the W.P.T. was enacted because the W.P.T. already fell within the "add-back" provision of *N.J.S.A.* 54:10A-4(k)(2)(C). He rejected the oil companies' contention that because the Legislature did not amend the C.B.T., the W.P.T. did not fall within the "add-back" provisions and that excludability was intended.

The oil companies moved for reconsideration of Judge Conley's decision. Judge Lario, who was assigned to hear these motions because Judge Conley had resigned from the bench to return to private practice, refused to "substitute . . . [his] interpretation of the Legislature's intent," for that of Judge Conley. *Amerada Hess Corp. v. Director, Div. of Director*, 7 *N.J. Tax* 275, 282 (1985) (*Amerada II*).

The Appellate Division reversed the Tax Court and held that the W.P.T. was "a federal excise tax imposed upon the difference between world prices and the adjusted base price." *Amerada Hess Corp. v. Director, Div. of Taxation*, 208 *N.J.*

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164 include those levied on real property, personal property, foreign, state and local income taxes, and general sales taxes.

The modification required by section 208.9(b)(3) of the Tax Law is not dependent on whether the federal tax is an excise tax or property tax or income tax in nature. The modification is required where the tax is levied on or measured by profit or income. As the windfall profit tax is measured by profit, the modification is required and the tax must be added to entire net income.

PAUL B. COBURN
Deputy Commissioner and Counsel

Super. 201, 203 (1986) (*Amerada III*), and that in calculating the net income base for the purposes of C.B.T., the oil companies could exclude the W.P.T.. The Appellate Division reasoned that since the W.P.T. was imposed as each barrel of crude oil is brought to the surface, "its consequences are in no way dependent upon the realization of gain or income, and no provision is made for a refund or credit should the barrel not be sold," *id*. at 203-04, and held that "the W.P.T. is not a tax on or measured by profits or income within the meaning of *N.J.S.A.* 54:10A-4(k)(2)(C)." The Appellate Division did not think that the 90% N.I.L. materially influenced the analysis because the N.I.L. was calculated on "properties" of the oil producer and not on "overall profitability." *Ibid*.

For the reasons given below, we reverse the judgment of the Appellate Division and reinstate the judgment of the Tax Court.

I

We conclude that the Tax Court properly applied the principle of probable legislative intent in deciding that the phrase in *N.J.S.A.* 54:10-4(k)(2)(C), "taxes paid or accrued to the United States on or measured by profits or income," included the W.P.T. The principle of probable intent applies where the legislative body, when adopting a statute, could not have contemplated a specific situation. In such a case we have said:

> Generally, a court's duty in construing a statute is to determine the intent of the Legislature. It cases such as this, where it is clear that the drafters of a statute did not consider or even contemplate a specific situation, this Court had adopted as an established rule of statutory construction the policy of interpreting the statute "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand'." *J.C. Chap. Prop. Owner's etc. Assoc. v. City Council*, 55 *N.J.* 86, 101 (1969) (quoting *Dvorkin v. Dover Tp.*, 29 *N.J.* 303, 315 (1959)); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467,

> appeal dismissed and *cert.* den., 379 *U.S.* 14, 85 *S.Ct.* 144, 13 L.Ed. 2d 84 (1964). Such an interpretation will not "turn on literalisms, technisms or the so-called rules of interpretation; [rather] it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." *J.C. Chap. Prop. Owner's*, 55 *N.J.* at 100. [*AMN, Inc. v. South Brunswick Township Rent Leveling Bd.*, 93 *N.J.* 518, 525 (1983).]

One commentator has noted, "Legislative purpose may also be a valuable guide to decision in cases where the effect of a statute on the situation at hand is unclear . . . because the situation was unforeseen at the time when the act was passed, . . ." 2A C. Sands, *Sutherland Statutory Construction*, § 45.09 (4th ed. 1984) (hereinafter *Sutherland*). The "common sense" of this-situation, as we perceive it, and as the Tax Court pointed out, *Amerada I*, 7 *N.J. Tax* at 56, is that if the Legislature had anticipated the enactment of the W.P.T., it would have been concerned over the possible effect of a new federal tax on profits on the State's revenues. The deductibility of the W.P.T. would shrink the State's tax base by the amount of the taxes paid. We think the Legislature probably would have viewed the W.P.T. as a tax on the "profits" and "income" of oil companies, thereby avoiding a revenue loss. Thus, no amendment to the C.B.T. would have been necessary to embrace the W.P.T. within the inclusive basis of *N.J.S.A.* 54:10A-4(k)(2)(C).

We reject the oil companies' contention that the doctrine of legislative intent has no application because the meaning of the statute is unclear and all doubts should be resolved in favor of the taxpayer. *See Fedders Fin. Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376, 386 (1984); *see also White v. United States*, 305 U.S. 281, 292, 83 L.Ed. 172 (1938), where Justice Stone said

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and

> duty of the courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suiters turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

Here we do not think the statute is unclear or of doubtful meaning. Moreover, where the taxpayer seeks exemption or deduction urging exclusion from the scope of the taxing statute, "the probable legislative intent is one of inclusion and exemptions are to be construed narrowly." *Fedders*, 96 *N.J.* at 386; *Boys' Club of Clifton, Inc. v. Township of Jefferson*, 72 *N.J.* 389, 398 (1977). The reason for this rule of construction is plain. Taxes "are demanded and received in order for government to function." *Bloomfield v. Academy of Medicine of N.J.*, 47 *N.J.* 358, 363 (1966). Exemptions "from taxation represent a departure and consequently they are most strongly construed against those claiming exemption." *Id.* As the Tax Court pointed out, "the issue here is whether the "plaintiffs may exclude or deduct the W.P.T." *Amerada I*, 7 *N.J. Tax* at 53. The Director's ruling that the taxpayers here did not meet that burden was reasonable in the circumstance.

We also reject the oil companies' contention that the issue involves solely the "add-back" of the W.P.T. to income or the inclusion of the W.P.T. in income. The scheme of the C.B.T. supports the Tax Court's characterization of the issue as one involving an exclusion or deduction. "Entire net income" for purposes of the preliminary computation of the C.B.T.'s income base is "federal taxable income" before the net operating loss deduction and special deductions, *e.g.*, the dividends received by corporations' deduction of *I.R.C.* § 243. *N.J.S.A.* 54:10A-4(k). As shown by some of the plaintiffs' 1980 and 1981 federal income tax returns, the W.P.T. was claimed as a deduction on line 17 in arriving at federal taxable income. But *N.J.S.A.* 54:10A-4(k)(2) provides that certain exclusions, deductions and credits are not allowed to the taxpayer in calculating entire net income under *N.J.S.A.* 54:10A-4(k)(2)(C). As noted, one disallowed deduction is for "taxes paid or accrued

to the United States on or measured by profits from income." Thus the correct characterization of the issue is whether the W.P.T. is a proper exclusion or deduction.

The oil companies' reliance on *Fedders* is unsuccessful for another reason. In *Fedders* Justice Schrieber noted that in addition to the rule concerning the strict construction of taxing statutes "when interpretation of a taxing statute is in doubt," 96 *N.J.* at 385, there is a second principle: a court must "follow the clear import of statutory language." *Id.* at 384-85. The Tax Court correctly concluded that the "clear import" of the W.P.T. fit the language of the taxing statute—"taxes on or measured by profits or income"—as these words are commonly understood.

Another fundamental principle of statutory construction applies here. Statutes must be read as a whole, giving effect where possible to every word. *Brown v. Brown*, 86 *N.J.* 565, 577 (1981); *Fabbi v. Division of Employment Sec.*, 35 *N.J.* 601, 606 (1961). When *N.J.S.A.* 54:10A-4(k), including subsection (k)(2)(C), is read in its entirety, we see that when the Legislature wanted to define the word "income" in terms of the federal income tax law, it did so in clear terms. The statute states that "entire net income" prior to the modifications in subsection (2)(A) through (2)(F) "shall be deemed . . . to be . . . the taxable income . . . which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax." The language of subsection (k)(2)(C) is completely different. The disallowed federal taxes are not described as income taxes, or net income taxes, or taxes based on income as measured for federal income tax purposes, but simply as federal taxes "on or measured by profits or income," a more inclusive concept. Nowhere in the C.B.T. do we find any intent to disallow only federal taxes similar or identical to the federal income tax.

The distinction between the preliminary computation of entire net income under the C.B.T. (which is clearly referenced to the federal income tax) and the modifications to that preliminary computation, which differs from the federal income tax, was explained by that Tax Court in *International*

Flavors and Fragrances, Inc. v. Director Div. of Taxation, 5 *N.J. Tax* 617 (Tax Ct. 1983), aff'd, 7 *N.J. Tax* 652 (App. Div. 1984), aff'd, 102 *N.J.* 210 (1986), when it said

> While the starting point for determination of entire net income under the act is taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report for Federal income tax purposes, the Corporation Business Tax deviates from the federal tax by providing its own inclusions and exclusions from the tax base. *N.J.S.A.* 54:10A-4(k). Only at the initial point is it indicated that the Legislature intended that federal standards were to be controlling. [5 *N.J. Tax* at 624.]

The Tax Court in the case before us agreed with this conclusion. *Amerada I*, 7 *N.J. Tax* at 57.

Finally on this point, we reject the oil companies' contention that legislative inaction or silence in respect of the enactment of the W.P.T. supports its contention on non-inclusion. We find the doctrine of probable legislative intent a more reliable guide than the so-called doctrine of legislative inaction. "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A *Sutherland* § 49.10. We see no common-sense reason why our Legislature would not have intended the W.P.T. to be included within the statutory disallowance for tax "on or measured by profits or income." We adopt Judge Conley's words in the Tax Court in this case when he said: "I am entirely satisfied from the ordinary meaning of these words and from the public perception of the purpose of the Windfall Profit Tax, that the legislators would have been reassured that no amendment of the statutory language was needed to protect the State's revenue source." 7 *N.J. Tax* at 56.

We find Justice Scalia's discussion of the use of legislative inaction as a tool of interpretation in *Johnson v. Transportation Agency, Santa Clara County*, 480 *U.S.* ____, 94 *L.Ed.* 2d 615 (1987) (dissenting opinion) of interest and apt.

The majority's response to this criticism of [*Steelworkers v. Weber*, 443 *U.S.* 193 (1979)], . . . asserts that, since "Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct." This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of total legislative package containing many *quids pro quo*.

• • • • •

But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. It is interesting to speculate on how the principle that congressional inaction proves judicial correctness would apply to another issue in the civil rights field, the liability of municipal corporations under § 1983. In 1961, we held that that statute did not reach municipalities. See *Monroe v. Pape*, 365 *U.S.* 167, 187 (1961). Congress took no action to overturn our decision, but we ourselves did, in *Monell v. New York City Dept. of Social Services*, 436 *U.S.* 658, 663 (1978). On the majority's logic, *Monell* was

wrongly decided, since Congress' seventeen years of silence established that *Monroe* had not "misperceived the political will," and one could therefore "assume that [*Monroe's*] interpretation was correct." On the other hand, nine years have now gone by since *Monell*, and Congress *again* has not amended § 1983. Should we now "assume that [*Monell's*] interpretation was correct"? Rather, I think we should admit that vindication by congressional inaction is a canard. [94 *L.Ed.* 2d at 656-57.]

For these reasons, we hold that the Tax Court correctly reasoned that under the doctrines of probable legislative intent and common-sense plain meaning the oil companies may not deduct the W.P.T. in calculating net income for C.B.T. purposes.

II

The characterization by the Director of the W.P.T. as a tax measured by "income" or "profits" is not an unusual or extreme conclusion. It is consistent with the conclusions reached by others and with oil industry economics.

A California decision construing the analogous phrase in the California corporation franchise tax, "taxes on or according to or measured by income or profits," concluded that the phrase included taxes on or measured by gross income. *MCA, Inc. v. Franchise Tax Bd.*, 115 *Cal. App.* 3d 185, 171 *Cal. Rptr.* 242, (Ct. App. 1981) (taxes paid to foreign governments on gross film rents and gross record royalties not deductible). "The fact that such rents and royalties also constituted MCA's gross receipts [did] not make the taxes any less taxes measured by gross income." *Id.* at ____, 171 *Cal. Rptr.* at 246. As noted, the New York State Department of Taxation and Finance construed the identical phrase in the New York corporation franchise tax law against deductibility finding it a tax "on or measured by profits or income" whether labelled an excise tax, a property tax, or an income tax. *Supra* at ____. The Attorney

General of South Carolina has concluded that the W.P.T. is a tax with respect to income that may not be deducted in computing income for South Carolina tax purposes. Opinion of the Attorney General, March 10, 1982, noted at *CCH State Tax Rptr.* (S.C.) ¶ 200-088.

The base and measure of the W.P.T. plainly fit the usual definitions of "income" and "profits." The W.P.T. is based on windfall profit. I.R.C. § 4986(a). The windfall profit is the difference between the removal or selling price and the adjusted base price plus severance tax adjustment. I.R.C. § 4988(a). The adjusted base price is essentially the price that could have been obtained for the oil under price controls, adjusted for inflation. The windfall profit cannot be equated with the market value of oil; it is a net amount, not simply the sales price, as in the case of federal transactional excise taxes.

The average adjusted base price, or actual costs, if more, were deductible by the oil companies from the sale price or fair market value of their crude oil to determine the measure and base of the W.P.T.. As explained by the State's economic expert, Dr. Vasquez, the existence of "income" for tax purposes does not require the deduction of all true economic costs. There are many provisions that are more arbitrary than the adjusted base price, having "little if any connection to economic cost." I.R.C. § 63(c) and § 1(f) (personal deduction); I.R.C. § 616(a) (expensing exploration and development costs); I.R.C. § 613(a) (excess of percentage over cost depletion); I.R.C. § 168 (the timing of depreciation deductions for accelerated cost recovery). The record before us and the opinion of Professor Deakin, another State's economic expert, show that the deduction of the adjusted base price permitted the recovery of all allowable costs for those oil companies that revealed such costs. Dr. Deakin's report, which stands essentially unchallenged in the record, stated:

> 21. The base price deduction, on average, more than compensates oil producers for costs incurred to produce the oil subject to the tax. The severance tax adjustment allows a deduction for the additional severance tax that

> arises as a result of the increase in the removal price of the oil as a result of price decontrol. This adjustment permits a dollar for dollar recovery of those incremental costs. Under price controls, base prices were supposed to permit economic recovery of crude oil. This means that the crude oil production operations must obtain at least a normal profit under price controls. If they did not, then producers would be expected to shut down operations and invest their money in other activities, all of which would be contrary to energy policy at the time. The prices allowed under price control should, therefore, permit a producer to recover production costs plus a reasonable return on production. To the extent that the prices in the price control system carried over to the Windfall Profit Tax as adjusted base prices, deduction of the adjusted base prices from revenue may be viewed as a deduction in lieu of itemizing production costs and normal profits. The Windfall Profit Tax itself is not included in the deductions to compute federal taxable income. To include either item in calculations of the tax base creates circularity.
>
> 22. Using the data available from published financial reports of these companies, it appears that the adjusted base prices exceeded average production costs (exclusive of Windfall Profit Tax) for all of the companies in this litigation. For example, in 1980, national adjusted base prices for the Windfall Profit ranged from $13.06 per barrel to $18.44 per barrel depending on the tier and the quarter. A survey of the annual reports of the companies showed that for 1980 the approximate average cost to produce an equivalent barrel of oil, exclusive of the Windfall Profit Tax but including depreciation, depletion and amortization, exploration costs, dry holes (when reported) and other costs to produce oil and gas ranged from $4.50 to $8.45 per barrel. Hence, on average, in 1980, these companies' costs were compensated for through the base price mechanism. In 1981, national adjusted base prices ranged from $14.47 to $20.81 per

> barrel, depending on the tier and the quarter in which the oil was produced. In 1981, the range of costs for the plaintiffs was between $7.49 and $13.48 per barrel. This analysis is based on costs reported according to generally accepted accounting principles and is subject to all the limitations that apply to such reports. Nonetheless, as a practical matter, the adjusted base price deduction appears to have the effect of allowing producers compensation for their average actual costs of production as those costs are measured under generally accepted accounting principles. Moreover, the difference between the adjusted base prices and the average costs to produce is sufficiently large to allow compensation for some additional costs before the adjusted base price deduction would fail, on average, to compensate oil producers for their production costs. Indeed, the net income limitation provisions allow for those cases where the adjusted base price does not adequately cover the costs to produce oil.

Thus the tax is based on profits.

As well stated by a California appellate court

> The [W.P.T.] statute imposes an excise tax *on profit* and furnishes the mechanics by which the profit and the tax are to be calculated. Had Congress desired to impose a tax on removal, other language would have been used. [*Crocker Nat'l Bank v. McFarland Energy, Inc*, 140 *Cal. App.* 3d 6, 189 *Cal. Rptr.* 302, 304 (Ct. App. 1983) (emphasis added).]

See also Lewis v. Reagan, 516 *F. Supp.* 548, 553 (D.D.C. 1981) ("The Windfall Profit Tax taxes the increased *income* that will accrue to the owners of domestic oil properties after the lifting of price controls.") (emphasis supplied); *United States v. Ptasynski, supra*, 462 *U.S.* at 103, 76 *L.Ed.* 2d at 436 ("[Congress] perceived that the decontrol legislation would result—in certain circumstances—in profits essentially unrelated to the objective of the program, *and concluded that these profits should be taxed.*") (emphasis added).

Many sections in the W.P.T. are intended to limit its tax base, not just to income but to that increment of income representing the excess of the uncontrolled price of oil over the controlled price. Further as Professor Deakin points out, we must assume that the controlled price permitted the recovery of the producer's costs or that a particular unprofitable field would have been abandoned by a prudent producer before decontrol. The adjusted base price equates roughly with the controlled price of oil in 1979. I.R.C. § 4989(c). The inflation adjustment is also cost motivated. I.R.C. § 4989(b). The severance tax adjustment, I.R.C. § 4988(a) and I.R.C. § 4996(c), insures that the base and measure of the W.P.T. excludes one of the major costs associated with decontrol—State severance taxes imposed on the incremental value of crude oil resulting from decontrol.

Congress' intention that the base of the W.P.T. allow a producer to recover production costs before taxation is most persuasively shown by the net income limitation (NIL) provision. I.R.C. § 4988. The purpose of the provision was to "prevent the tax from burdening high cost properties . . . where the net income per barrel is less than the windfall profit." (House Report at 2; Senate Report at 29). (H.R. Rep. No. 96-394, 96th Cong. 1st. Sess. 1980 U.S. Cong. & Ad. News 589; S. Rep. No. 96-394, 96th Cong. 1st Sess. 29 (1979) 1980 U.S. Cong. & Ad. News 438, 439).

Computation of the net income per barrel is based upon the computations of gross income and taxable income used to determine percentage depletion for federal income tax purposes. I.R.C. § 4988(b)(3). Gross income from a property is determined under *Treas. Reg.* § 1.613-3, reprinted in *CCH Federal Tax Rptr.* 1987 Vol. 5, ¶ 3557C. This regulation helps determine gross income from the oil and gas well for I.R.C. § 613(a) and (c)(1) when the oil is not sold but is refined or converted by the same oil company. The regulation is used to determine gross income for purposes of computing percentage depletion—either the selling price in the immediate vicinity of the well, or, if the oil is not sold on the premises, the "representative market or field price before conversion or transportation." The latter price equates generally with the

removal price under the W.P.T. when oil is not sold on the premises. Compare I.R.C. § 4988(b)(3) with I.R.C. § 4988(c)(3), both referenced to I.R.C. § 613. Taxable income is the gross income from the property less the expenses set forth in the regulation, including operating expenses, certain sales costs, administrative and financial overhead, depreciation, taxes deductible under § 162 or § 164, (except the W.P.T.), losses, and exploration and development expenditures. I.R.C. § 4988(b)(3); *Treas Reg.* § 1.613-3. These expenses are a producer's actual expenses incurred on or allocable to a particular property. The process of calculation of the net income or taxable income when the N.I.L. is employed is described in Shurtz, *The Windfall Profit Tax—Poor Tax Policy? Poor Energy Policy?*" 34 *U. Miami L. Rev.* 1115, 1142-43 (1980).

> The net income or taxable income under section 4988(b) is calculated as it is under section 613(a), relating to percentage depletion, but with certain modifications. Taxable income from the property equals gross income less allowable deductions. Deductible items include operating expenses, certain selling expenses, administrative and financial overhead, depreciation, deductible taxes, losses sustained, intangible drilling and development costs, exploration and development expenditures, and other similar expenditures. For purposes of section 4988(b), this taxable income is calculated as in section 613 but without deductions for intangible drilling and development costs or the windfall profit tax. In lieu of these deductions, the Act allows an imputed cost depletion deduction, the calculation of which depends on whether the producer uses percentage or cost depletion. If a producer actually capitalizes intangible drilling costs for income tax purposes, he may reduce his taxable income from the property by the amount of the deduction under section 611 (either as cost depletion or as depreciation). If the producer used percentage depletion for the property for all periods during which he owned an economic interest in it, the producer's taxable income is reduced for cost depletion, which would have been allowable if all intangible drilling costs incurred by the taxpayer on the property had been capitalized and taken into account in computing the depletion. In contrast to the provisions of the House and Senate Reports, the Act allows the producer to treat qualified tertiary injectant costs as if they had been capitalized and recovered through cost depletion.

Despite the contrary suggestion by certain of the oil companies, cost depletion is allowed in determining net income. See I.R.C. § 4988(b)(3)(C). The W.P.T. itself is not allowed as a deduction in calculating the W.P.T. base. This is not surprising since the purpose of the net income computation is to determine the tax base for the W.P.T. To allow a deduction in the tax base for the tax itself would be circular. Under I.R.C. § 4988(b)(3)(C) such costs are deductible over time because they are included in the capitalized cost of the property for W.P.T. cost depletion purposes.

Hess mischaracterizes the N.I.L. in claiming that it is only a limitation on and does not define the base of the W.P.T. When the N.I.L. is invoked, the base for imposing the W.P.T. becomes 90% of the net income per barrel. As stated by Texaco's tax attorney, the W.P.T. is imposed on the "smaller" of the windfall profit or the net income per barrel. Alleged infrequent use of the N.I.L. during 1980 and 1981 as proof that it does not limit the tax base to net income, as urged by the Atlantic oil companies, is not persuasive. During the "phased decontrol" period, 1980, the N.I.L. substantially reduced the oil companies' W.P.T. liability. In 1980 all but one of the plaintiff oil companies computed the tax based upon the net income from the property on between 14% and about 73% of their respective production. The effect was less pronounced in 1981. The dollar reduction in tax liability for the various oil companies resulting from use of the N.I.L. ranged from 21% to 45% in 1980 to 3% to 13% in 1981 and totaled $1,685,465,293 for these two years. The reason the N.I.L. was not used more frequently was that often the windfall profit was smaller than the net income base. In these cases, the deduction for the

adjusted base price plus incremental severance taxes exceeded the oil companies' actual costs.

As the Director's expert Vasquez points out, the absence of absolute economic symmetry in a tax scheme is no ground to dismiss it as irrational, illogical or misdescribed. He stated:

> The plaintiffs argue that income implies a "gain," which in turn implies that the tax base is gross income less allowable deductions for cost. The plaintiffs argue that the Windfall Profit Tax is based solely on the value of oil above some threshold without reference to the cost of producing the oil.
>
> This assertion is wrong; the Windfall Profit Tax does in fact recognize cost. The higher of the adjusted base price or cost computed for the net income limitation is allowed as a deduction in computing income for purpose of the Windfall Profit Tax. The adjusted base price does not equal economic costs. However, under the current Federal individual and corporate income tax structures, the measure of income includes allowances for costs that are often just as arbitrary as allowing a deduction for the "adjusted base price." If the arbitrariness of deductions from income is grounds for declaring that the resulting net amount is not income for tax purposes, then the base of the corporate and individual income taxes fails to qualify as income on the same grounds.
>
> One example of the arbitrariness of allowable deductions is the zero bracket amount allowed individuals. The zero bracket amount allows a deduction from gross income that is not based on any notion of cost or outlay. Independent of the income spent on medical expenses, interest, state and local taxers, union dues or other allowable itemized deductions, a taxpayer is simply allowed to deduct an amount that was legislated by Congress. Similar to the adjusted base price, the zero bracket amount will increase with inflation starting in 1985. Despite this legislated deduction, the individual income tax is viewed by most analysts as a tax based on income.

We agree.

Under ordinary dictionary definitions of "income," *i.e.*, all that comes in without regard to expenditures, the windfall profit clearly constitutes "income." The windfall profit also meets a more restrictive definition, *i.e.*, gross receipts less costs of goods sold, because the deduction for the adjusted base price plus severance tax adjustments permits more than the deduction of getting the oil out of the ground (producer's cost of goods), and in cases where the windfall profit exceeds 90% of the net income per barrel, the tax base becomes the lower amount, 90% of net income. Even if the term "profits" is given its most restrictive meaning, *i.e.*, revenue less expenses, the base of the W.P.T. is within the definition because the N.I.L. permits the deduction of all reasonably allocable expenses before arriving at net income. Because the tax is reasonably geared to establishing realized or realizable gain at an easily-measured stage, we reject the oil companies' contention that there must be immediate realization from a sale or exchange, a netting of ultimate gains or losses of an integrated company, a computation of an integrated entrepreneur's income or profit, or an annual or other periodic computation. The Director's decision that the oil companies experienced a realization of income or profit upon extraction of crude oil at the wellhead is amply supported in this record and by common sense. It is very unlikely, if not realistically impossible, given the structure of the W.P.T. and the market conditions under which it was imposed, that any integrated oil company producer would both pay the W.P.T. and suffer a net loss at the end of an annual period, and this was hardly the experience of the parties before us.

III

There is adequate support in the record for the conclusion that the windfall profit tax qualifies as a tax on "income" or "profit" in the economic sense. The Director's expert, Dr. Vasquez, reported that of the three necessary ingredients postulated by plaintiffs—realization, cost recovery, and time—only

one, deduction for costs, was necessary to satisfy the economic definition of income. He also concluded that no existing federal tax would qualify as a tax on income if deductions for true economic costs were required as a strict test. Under the W.P.T. the deduction for the greater of the adjusted base price or actual costs under the N.I.L. is as accurate a representation of true costs as many of the deductions in the I.R.C. for other income tax purposes. For example, he explained that in the case of oil producers, the deduction for the excess of percentage over cost depletion, I.R.C. § 613(a), bears no relation to actual cost. Dr. Vasquez also observed that since economic income may be computed on "an accrual basis" without a sale, contemporaneous realization is not required. He concluded that while the deduction for the adjusted base price under the W.P.T. may be an arbitrary allowance for costs, it is no more arbitrary than the zero bracket amount, the expensing of exploration and development costs, and percentage depletion. He noted that the N.I.L. computation recognized costs in an economic sense—thus, the base and measure of the W.P.T., the lesser of the windfall profit per barrel or 90% of the net income per barrel, satisfied economic concepts of income as well as does the tax base for the conventional federal individual and corporate income tax satisfied such concepts.

In the Tax Court, the oil companies made no attempt to counter these opinions of the State's economists. They simply argued that the court should adopt the two other theories of income, realization and a flow of money accruing within a fixed temporal period. Where there is a rational basis in the record for the economic conclusion inferred from the facts, an appellate court may affirm. We cannot in any sense say that the factual conclusion of the Director and the decision of the Tax Court that the tax in fact was levied here on "profit" and "income" was arbitrary, capricious, unreasonable, or unsupported by substantial credible evidence in the record as a whole. *See Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980).

Among the early federal income tax decisions relied upon by the plaintiffs is *Eisener v. Macomber*, 252 *U.S.* 189, 64 *L.Ed.* 521 (1920). In determining that a common stock dividend paid

on common stock was not income, the Court defined income as " 'the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets. . . ." 252 *U.S.* at 207. The Court went on to state that income must be "something of exchangeable value . . . severed from the capital . . . and . . . received or drawn by the recipient (the taxpayer), for his separate use, benefit and disposal. . . ." *Ibid.* The receipt of a stock dividend did not permit the taxpayer to withdraw any part of his capital; rather, his investment remained "subject to the risks of the enterprise." *Id.* at 208. The Court concluded that a taxpayer does not realize income if, "every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money . . . still remains . . . subject to business risks which may result in wiping out the entire investment." *Id.* at 211.

The lifting of crude oil meets even the strict requirements of the *Macomber* definition of realization, including the requirement of conversion. When lifted to the surface and captured, the oil has been "severed" from the capital. It is no longer part of a deposit of unknown quantity several thousand feet down in the earth. As Professor Deakins noted, it has a fixed exchangeable value tied to a posted price system. The producer receives it for his separate use and benefit. The business risks have fundamentally changed; the producer's entire investment is unlikely to be wiped out. There has been a "conversion of capital assets" from an indeterminable underground deposit to a fungible, readily marketable product. (Deakin Report at 21). The *Macomber* requirement has since been modified. *See United States v. Kirby Lumber Co.*, 284 *U.S.* 1 (1931) (Gain to corporation by redeeming bonds at a price less than par value).

Lifting crude oil completes the production process and therefore constitutes "the completion of a transaction." *Helvering v. Brunn*, 309 *U.S.* 461, 469, 84 *L.Ed.* 864, 869 (1940). While there may be no sale, the value of the oil is plainly "ascertainable." Posted prices

> control the amounts at which crude oil passes from hand to hand in the fields to which they relate. They are a bonafide competitive price, not subject to manipulation or rigging, for the reason, aside from others, that their maintenance is effectively policed by state regulatory bodies and also by state and Federal taxing authorities in connection with enforcement of taxing statutes. [*Skelly Oil Co. v. Commissioner of Taxation*, 131 *N.W.* 2d 632, 636 (Minn. 1964).]

The fact that the posted price may fall subsequent to the lifting of the oil or that some barrels may be lost following severance from the lease is irrelevant. The fact that some of the plaintiffs subsequently lose barrels of oil and are not entitled to refunds of W.P.T. in respect of such losses does not impugn the fact that oil production income is realized when the oil is lifted. According to this record these "downstream" losses are minimal, in fact less than .2% of production plus purchases of crude oil. The posted price fixes the value of the oil at the point of lifting. Later events do not detract from this fact (Deakin Report at 20).

Following production or lifting of crude oil, plaintiffs either sell the oil to third parties, exchange it with third parties, or transfer it to the refining division of their integrated businesses. For example, as a percentage of crude oil produced by the eleven Atlantic plaintiffs plus crude oil acquired after lifting from other companies, the Atlantic plaintiffs sold at the crude oil stage without refinement between 0% and 53% of their total barrels and exchanged between 0% and 84%. Every Atlantic plaintiff either sold or exchanged some amount of oil at the crude oil stage before refinement.

IV

The fact that the W.P.T. has been labeled or termed an excise tax (I.R.C. § 4986(a)) does not prevent it from being on or measured by income or profits. There are other federal excise taxes measured by income in Subtitle D–Miscellaneous Excise

Taxes. I.R.C. § 4981 (excise tax on the undistributed taxable income of real estate investment trusts); I.R.C. § 4940 (excise tax on investment income of private foundations).

State taxes that are denominated franchise or excise taxes are often measured by income. The New Jersey corporation business tax itself is a franchise or excise tax measured in part by income. *Cities Servs. Co. v. Director, Div. of Taxation*, 5 *N.J. Tax* 257, 271 (Tax Ct. 1983). The savings institution tax, *N.J.S.A.* 54:10D-1 to -10D-18, is stated to be an excise tax measured by net income. *N.J.S.A.* 54:10D-3; *see also Commissioner of Rev. v. Massachusetts Mutual Life Ins. Co.*, 428 *N.E.* 2d 1979 (Mass. 1981).

Thus, despite Texaco's arguments to the contrary, the fact that the W.P.T. may be denominated an excise tax (I.R.C. § 4986) does not determine whether it falls within the statutory disallowance for taxes "on or measured by profits or income." The label appended to the tax is not conclusive. Indeed, it has been suggested that "income" for purposes of an excise tax may differ from "income" as conceived under an income tax. *Commissioner of Revenue v. Massachusetts Mut. Life Ins. Co., supra*, 428 *N.E.* 2d at 301 (Massachusetts excise tax measured by gross investment income could include in the measure of the tax items such as imputed home office rent which would not be income in the traditional sense); *Polaroid Corp. v. Commissioner of Revenue*, 472 *N.E.* 2d 259, 264 n. 10 (Mass. 1984). Under such a view, the fact that the W.P.T. is an excise tax supports rather than detracts from the conclusion that it is "on or measured by profits or income." *See Crocker Nat'l Bank v. McFarland Energy Inc.*, 140 *Cal. App.* 3d 6, 189 *Cal. Rptr*, 302 (Ct. App. 1983), where the court stated

> The [W.P.T.] statute imposes an excise tax on profit and furnishes the mechanics by which the profit and the tax are to be calculated. Had Congress desired to impose a tax on removal, other language would have been used. [*Id.* at ____, 189 *Cal Rptr.* at 304.]

In dismissing a taxpayer's suit under the Anti-Injunction Act, the court in *Lewis v. Reagan*, *supra*, 516 *F. Supp.* at 552, noted

that "The W.P.T. taxes the increased income that will accrue to the owners of domestic oil properties after the lifting of price controls."

As the Tax Court properly stated, "The precise issue in this litigation is whether the crude oil windfall profit tax is a tax 'on or measured by profits or income' *within the intent of the Corporation Business Tax Act*." *Amerada I*, 7 *N.J. Tax* at 54. Many federal legislators viewed the W.P.T. as exacted on profits. The House and Senate Committee Reports both stated that the tax will reduce the profits of the oil companies. *House Report* at 2, 1980 U.S. Cong. & Ad. News 589, 590; *Senate Report* at 2, 1980 U.S. Cong. & Ad. News 413, 414. Expressing their additional views, Senators Ribicoff, Nelson, Moynihan, Baucus, Bradley, Packwood, Roth, Danforth, Chafee, Heinz and Durenberger stated concerning the increases in world oil prices:

> Here, we believe, there is a huge "windfall" to producers; presumably, this oil was profitable at $6 and will be over 400 percent more profitable after decontrol. . . .
>
> Oil companies do not need to keep all the windfall profits from prior investments as an incentive to explain exploration and production, as long as they are assured of higher prices. According to their third quarter reports, cash flow is not a problem for most oil companies. Even under the committee bill, decontrol will add $374 billion to oil producers' net revenues over the next ten years [*Senate Report* at 132-33, 1980 U.S. Cong. & Ad. News 538.]

In like vein, Senator Matsunaga stated

> While producers enjoy the windfall profits that will accrue because of cartel pricing, it is only fair that they should share this windfall profit with the Nation. [*Senate Report* at 162, 1980 U.S. Cong. & Ad. News 565.]

Numerous other Congressmen viewed the W.P.T. as a tax on profits. *See* 125 *Cong. Rec.* H17141 (Rep. Lederer); 125 *Cong. Rec.* H17141 (Rep. Shannon); 125 *Cong. Rec.* H17151 (Rep. Ullman); 125 *Cong. Rec.* H17152 (Rep. Harris).

IV

We reject the balance of the oil companies' additional contentions on this appeal for these reasons.

1. Hess asserts as its main argument that because the statutory disallowance for taxes on income and profits was added to the New York franchise tax to cover the federal income and federal excess profits tax, the disallowance in the C.B.T. can apply only to those taxes or to taxes that Hess equates with those taxes that in its view do not include the W.P.T. But Hess' argument overlooks the basic point that the reach of a statute is not limited to situations existing at the time of its adoption. *Radiofone Corp. of N.J. v. Director, Div. of Taxation*, 4 *N.J. Tax* 420, 430 (1982). As noted, the New York State Department of Taxation and Finance is in agreement with our view. Its official position is to disallow a deduction for the W.P.T. in determining entire net income under the New York analogue to New Jersey's CBT. *Supra*. at n. 1. We agree with the Attorney General's observation that ultimately "the whole excursion into New York legislative history is beside the point." The language in the New Jersey C.B.T.—"taxes on or measured by profits or income"—is on its face sufficiently broad to include taxes other than the federal income tax and federal excess profits tax. Resort to New York legislative history is not helpful and surely not determinative.

2. The Atlantic plaintiffs urge that since the Director would not permit separate accounting in determining plaintiffs' entire net income, he cannot deny a deduction for the W.P.T. which they contend is measured by segmenting income or profit, that is, the income or profits from plaintiffs' exploration and production divisions. These plaintiffs assert that such an asymmetrical construction of *N.J.S.A.* 54:10A-4(k) is not permissible because *N.J.S.A.* 54:10A-4, -5,and -6 should be construed "in *pari materia*," citing *American Tel. & Tel. Co. v. Director, Div. of Taxation*, 4 *N.J. Tax* 638 (Tax Ct. 1982), aff'd, 194 *N.J. Super*. 168 (App. Div. 1984). We disagree. That case had nothing to do with a deduction claimed in arriving at entire net

income. The court was there concerned with the inclusion of income items in subsection 4 and the inclusion of gross receipt items in subsection 6. Where, as here, the issue is the allowability of a claimed deduction and not the inclusion or exclusion of income from the tax base, there is not logical compulsion requiring a symmetrical computation with the receipts' fraction.

3. The Atlantic plaintiffs assert that the addition of the W.P.T. to the net income base of the C.B.T. results in a distortion between the base, which they contend now includes an item of unearned income, and the receipts factor of the apportionment fraction, which includes only earned receipts. Denial of a deduction for the W.P.T. may augment the entire net income by the amount disallowed but this does not add unrealized income to the base. Whether a deduction is allowed or disallowed in arriving at entire net income does not change the nature of plaintiffs' receipts, which are still realized. We find no precedent or justification for plaintiffs' contention that the disallowance provision applies only to federal taxes directed at the same income base as the C.B.T.

4. We reject the contention that denial of a deduction for the W.P.T. violates the Due Process Clause. Plaintiffs are concededly unitary businesses. New Jersey is entitled to include in their respective tax bases 100% of each companies' entire net income. The reduction of that base to reflect constitutionally taxable income attributable to New Jersey activities is accomplished by the three-factor apportionment formula. *Silent Hoist & Crane v. Director, Div. of Taxation*, 100 *N.J.* 1, 7 (1985). As the Tax Court properly noted, "[T]he question here is only whether plaintiffs may claim a deduction from their net income tax base, not whether there should be an addition to that portion of the tax base." *Amerada I*, 7 *N.J. Tax* at 57.

Denial of the W.P.T. deduction does not violate the commerce clause because it does not favor in-state over out-of-state economic activity. *See Commonwealth Edison Co. v. Montano*, 453 *U.S.* 609, 69 *L.Ed.* 2d 884 (1981); *Exxon Corp. v. Governor of Maryland*, 437 *U.S.* 117, 57 *L.Ed.* 2d 91 (1978).

Because the denial of a deduction for the W.P.T. was not based on the interstate nature of plaintiffs' businesses and did not burden out-of-state companies, consumers, or transactions while favoring in-state activities, the disallowance did not discriminate against interstate commerce. Nor does the disallowance overcome the strong presumption of constitutionality confronting the plaintiffs' equal-protection-clause attack. *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 *U.S.* 356, 359, 35 *L.Ed.* 2d 351, 354-355 (1973). Plaintiffs are denied a deduction because they produce crude oil and pay the W.P.T. The fact that they are disallowed the deduction while non-oil-producing petroleum marketers are not affected is because non-oil-producing marketers do not pay the W.P.T. Moreover, the nonproducing marketers did not benefit, as did plaintiffs, from the decontrol of crude oil prices, but had to purchase their crude oil at the higher decontrolled prices.

5. Finally, we reject the contention that denial of a deduction violates the supremacy clause by thwarting federal energy and revenue polices. There is no substantial connection between disallowance of the deduction and the accomplishment of these polices. Although the legislative history suggests an assumption that the tax would generally be deductible for state income tax purposes, there is no shred of evidence that such treatment was a mandatory or integral part of the over-all federal policies motivating passage of the legislation. We find no readily apparently conflict with any federal law or any expressed or clearly implied federal policy. *See Armstrong v. Director, Div. of Taxation*, 5 *N.J. Tax* 117, 131 (Tax Ct. 1983), aff'd *o.b.*, 6 *N.J. Tax* 447 (App. Div. 1984). We will not presume such a conflict.

We reverse the judgment of the Appellate Division and reinstate the judgment of the Tax Court.

Justices Clifford, Handler, O'Hern and Stein join in this opinion. Chief Justice Wilentz and Justices Pollock and Garibaldi did not participate.

Appendix B

Opinion of the Appellate Division of the Superior Court of New Jersey (February 7, 1986)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2795-84T7, A-2796-84T7
A-2797-84T7, A-2799-84T7
A-2800-84T7, A-2812-84T7
A-2809-84T7, A-2814-84T7
A-2813-84T7, A-2818-84T7
A-2816-84T7, A-2819-84T7
A-2832-84T7, A-2846-84T7

AMERADA HESS CORPORATION, ATLANTIC RICHFIELD COMPANY, CONOCO INC., CITIES SERVICE COMPANY, EXXON CORPORATION, PHILLIPS PETROLEUM COMPANY, CHEVRON U.S.A. INC., MOBIL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, SHELL OIL COMPANY, DIAMOND SHAMROCK CORPORATION, TENNECO OIL COMPANY, and TEXACO, INC.,

Plaintiffs-Appellants,

—v.—

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

Argued January 7, 1986—Decided February 7, 1986

Before Judges Antell, Shebell and Muir.

On appeal from final judgments of the New Jersey Tax Court whose opinion is reported at 7 *N.J. Tax* 51.

The opinion of the court was delivered by, ANTELL, *P.J.A.D.*

Plaintiffs, consisting of fourteen domestic oil producers, appeal from a determination of the Tax Court requiring taxes paid to the federal government under the Crude Oil Windfall Profit Tax Act of 1980, 26 *U.S.C.A.* §§ 4986-4998, (hereinafter referred to as "WPT") to be included as taxable income under the New Jersey Corporation Business Tax Act, *N.J.S.A.* 54:10A-1 *et seq.* (hereinafter referred to as "CBT"). The opinion of the Tax Court is reported at 7 *N.J. Tax* 51 (Tax Ct. 1984). The essential factual and statutory framework is not in dispute.

The CBT was amended in 1958 to provide for the payment of taxes on "entire net income." This is defined by *N.J.S.A.* 54:10A-4(k) as follows:

> (k) "Entire net income" shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax; provided, however, that in the determination of such entire net income,
>
> * * * *
>
> (2) Entire net income shall be determined without the exclusion, deduction or credit of:
>
> * * * *
>
> (C) Taxes paid or accrued to the United States on or measured by profits or income. . . .

This appeal focuses on the proviso that entire net income shall be determined "without the exclusion, deduction or credit of: * * * [t]axes paid or accrued to the United States on or measured by profits or income . . .," referred to as the "add-back" provision. As the Tax Court observed, the precise issue is whether the WPT tax is a tax on or measured by profits or income within the meaning of the foregoing enactment.

The WPT was enacted by Congress following the removal of controls upon the price of domestically produced crude oil. The effect of decontrol was to enable the oil producers to receive prices paid on the world market in competition with foreign producers. As respondent acknowledges, the WPT is a federal excise tax imposed upon the difference between world prices and the adjusted base price, which is the controlled price after allowance for inflation and severance taxes. The so-called windfall profit lies in the difference between the two prices. The tax is imposed on each barrel of crude oil when it is brought to the surface and "removed from the premises," 26 *U.S.C.A.* § 4986(a), regardless of how much the producer later receives for the barrel, whether it is ever resold on the market and even if it is lost or destroyed. Its consequences are in no way dependent upon the realization of gain or income, and no provision is made for a refund or credit should the barrel not be sold. However, the WPT provides for a "net income limitation" which confines the tax base to the lesser of the windfall profit per barrel or 90% of the net income attributable to the barrel. 26 *U.S.C.A.* § 4988(b)(1). The net income attributable to the barrel is calculated by dividing the taxable income realized by the particular oil property by the number of barrels produced. 26 *U.S.C.A.* § 4988(b)(2).

As one commentator has noted, the term "windfall profit" in the title of the Act is, in part, a misnomer. Shurtz, "The Windfall Profit Tax-Poor Tax Policy? Poor Energy Policy?," 34 *Univ. Miami L. Rev.* 1115, 1117 (1980). The structure of the Act is designed to increase the production of domestic oil and to promote energy independence for the United States. *Id.* at 1156. Thus, oil exploration is encouraged by imposing varying rates of taxation ranging from 30% to 70% on different

"tiers" of oil. 26 *U.S.C.A.* § 4987(b). To greatly simplify, tier-one oil, upon which the highest tax rate is imposed, comes from properties which were producing before 1973; tier-two oil comes from properties which began production after 1972; tier-three oil includes oil produced through very expensive tertiary recovery techniques and oil discovered after January 1979. *See* 26 *U.S.C.A.* § 4991; Robison, "The Misnamed Tax: The Crude Oil Windfall Profits Tax of 1980," 84 *Dickinson L. Rev.* 589, 592-595 (1980). Under the Act, certain newly produced oil, such as that taken from a property in Alaska outside one of the existing Prudhoe Bay properties, is exempt. 26 *U.S.C.A.* §§ 4991(b) and 4994(e); Shurtz, *supra*, at 1156. It is evident, therefore, that the amount of tax actually realized from each barrel of crude removed from the premises is significantly affected by factors unrelated to income or profit.

Because the WPT is payable without regard to the profitability of the oil producers' overall business activities plaintiffs maintain that it is not a tax on or measured by profits or income and should therefore be deducted from entire net income in determining the tax base under the CBT.

The Tax Court decided that the WPT fell within the add-back provision of the CBT on the sole ground that by failing to amend the CBT following passage of the WPT the state legislature demonstrated its understanding that no further legislative action was needed to clarify its intent that the WPT *was not* deductible from entire net income. This rationale is flawed by the fact that it arbitrarily presupposes the very fact in question. The court could just as easily have reached a contrary result by assuming that the legislature did not amend the CBT in recognition that the CBT as written sufficiently manifested its intent that the WPT *was* deductible from entire net income. Thus, it has been observed, "[i]nsofar as legislative intent is concerned inaction demonstrates nothing more than that subsequent legislatures failed to act." *Masse v. Public Employees Retirem. Sys.*, 87 *N.J.* 252, 264 (1981).

Our treatment of this issue begins with the rule that "when interpretation of a taxing provision is in doubt, and there is no legislative history that dispels that doubt, the court should

construe the statute in favor of the taxpayer." *Fedders Financial Corp. v. Taxation Div. Dir.*, 96 *N.J.* 376, 385 (1984). See also *Kingsley v. Hawthorne Fabrics, Inc.*, 41 *N.J.* 521, 528-29 (1964) wherein the Supreme Court quoted approvingly the following language from *Gould v. Gould*, 245 *U.S.* 151, 153, 38 *S.Ct.* 53, 62 *L.Ed.* 211, 213 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

In the definition of "entire net income" as a tax base for the CBT we discern from the use of such terms as "total net income," "gain" and "profit" an intent to tax the difference between revenues and expenses received and incurred in the overall conduct of business. Indeed, the statute itself specifies that entire net income

> shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax. . . .

For purposes of federal income taxation the WPT is declared a deductible expense, like state and local taxes, 26 *U.S.C.A.* § 164(a)(5), rather than as one of the nondeductible taxes enumerated at 26 *U.S.C.A.* § 275, typically federal income, excess profits and penalty excise taxes. As H.R. Rep. No. 96-304 (June 22, 1979) states at 600: "the Windfall Profit Tax is a deductible business expense under the income tax."

In our view the purpose of the add-back provision is to preserve undiluted for state taxation the same tax base upon which federal income taxes were computed. That it should not be read to include legitimate business expenses so as to create

tax liabilities in spite of overall losses is suggested by the philosophy implicit in report of the New Jersey Tax Policy Committee, *Non-Property Taxes in a Fair and Equitable Tax System* (1972). This document was prepared by a distinguished committee appointed by Governor Cahill in 1970 and comprehensively reviews New Jersey's system of public financing. One of the questions which it explored was whether and to what extent New Jersey should rely on the net worth or net income components of the CBT. In recommending an increase in the tax rate on the net income component the committee stated:

> In reaching these conclusions, we have proceeded on the premise that, in general, the net income measure of the corporate tax commends itself, *because it imposes the levy in accordance with actual profits earned, whereas the net worth tax, which is essentially a levy measured by net property owned, is payable regardless of profit, and is, accordingly, levied on all corporations including those that experience losses during the taxable year.* Moreover, the tendency in State taxation in recent years has been to rely more and more on corporate income taxes. [Id. at 17. Emphasis ours].

Respondent's contention that the 90% net income limitation of the WPT is a safeguard against tax liability for an overall unprofitable operation does not affect our result. This is explained in *Robison*, "The Misnamed Tax: The Crude Oil Windfall Profits Tax of 1980," 84 *Dickinson L. Rev.* 589, 601, n.89 (1980):

> This 90% net income limitation raises problems because it is calculated with respect to a "property" and not with respect to the overall profitability of the oil producing entity. Even small oil companies usually own several oil producing properties. Even if one oil property is producing oil at a profit substantial losses from other property may actually put the producer in a net loss position. The windfall profits tax will still have to be paid, however, on the oil produced from the "profitable" property. The

possibility that an oil producer would have to pay the windfall profits tax although in a loss position was even recognized by a proponent of the tax. *See* Cong. Rec. S17481-82 (Daily Ed. Nov. 27, 1979) (remarks of Senator Chaffee in response to queries from Senator Armstrong).

We conclude that the WPT is not a tax on or measured by profits or income within the meaning of *N.J.S.A.* 54:10A-4(k)(2)(C).

Reversed.

Appendix C

Opinion of the Tax Court of New Jersey
(September 28, 1984)

TAX COURT OF NEW JERSEY

DOCKET NOS. CB 064B-83, CB 065B-83, CB 066B-83, CB 067B-83, CB 068B-83, CB 069B-83, CB 070B-83, CB 071B-83, CB 072B-83, CB 073B-83, CB 074B-83, CB 075B-83, CB 077B-83, CB 128B-83

AMERADA HESS CORPORATION, ATLANTIC RICHFIELD COMPANY, CONOCO INC., CITIES SERVICE COMPANY, EXXON CORPORATION, PHILLIPS PETROLEUM COMPANY, CHEVRON U.S.A. INC., MOBIL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, SHELL OIL COMPANY, DIAMOND SHAMROCK CORPORATION, TENNECO OIL COMPANY, and TEXACO, INC.,

Plaintiffs,

—v.—

DIRECTOR, DIVISION OF TAXATION,

Defendant.

Decided September 28, 1984

CONLEY, J.T.C.

This is a case of statutory construction. It involves the interpretation of only seven words in the New Jersey Corporation Business Tax Act (1945), *N.J.S.A.* 54:10A-1 *et seq.*, but the decision affects 1980 deficiency assessments totalling more than ten million dollars against some of the major oil companies in the United States.

Since the identical legal issue is presented in each of the separate complaints filed by 14 taxpayers, the matters were consolidated for hearing and disposition. Plaintiff taxpayers have all filed motions for summary judgment and the Attorney General of New Jersey has filed a cross-motion for summary judgment in each case. The parties have filed thousands of pages of briefs, affidavits, deposition transcripts and exhibits in connection with the motions. Some of the record has been sealed by consent pursuant to *R.*4:10-3 because of the confidential nature of the oil and gas industry.

Stated succinctly, the dispute is whether in computing their entire net income on which the New Jersey corporation business tax is in part assessed, these taxpayers may exclude or deduct the amount of any taxes paid or accrued to the federal government under the Crude Oil Windfall Profit Tax Act of 1980, 94 *Stat.* 229, 26 *U.S.C.A.* §§ 4986-4997. Plaintiffs argue that they may exclude their windfall profit tax liabilities from this computation and the Director of the Division of Taxation argues that they may not do so. Some of the federal tax obligations are substantial, of course, and it follows that it makes a substantial difference whether plaintiffs' net income tax bases for corporation business tax purposes include or exclude the amounts of these federal tax obligations.

The seven statutory words to be construed are contained in the definition of "entire net income" found in *N.J.S.A.* 54:10A-4(k). Insofar as that section is pertinent to this matter it provides as follows:

> (k) "Entire net income" shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States

> Treasury Department for the purpose of computing its federal income tax; provided, however, that in the determination of such entire net income,
>
> • • • •
>
> (2) Entire net income shall be determined without the exclusion, deduction or credit of:
>
> • • • •
>
> (C) Taxes paid or accrued to the United States on or measured by profits or income. . . . [*N.J.S.A.* 54:10A-4(k)(2)(C); emphasis supplied]

The precise issue in this litigation, therefore, is whether the crude oil windfall profit tax is a tax "on or measured by profits or income" within the intent of the corporation business tax act. The intent of the act is paramount because, as the New Jersey Supreme Court observed very recently: "We continue to adhere to the view that our task is to ascertain the legislative intent." *Fedders Financial Corp. v. Division of Taxation Director*, 96 *N.J.* 376, 385-86 (1984).

Although this is the threshhold issue, it has not been adequately addressed by plaintiffs. The court has been presented with a comprehensive and meticulous analysis of the crude oil windfall profit tax and the nuances of federal income and excise tax theory. However, little attention has been paid by the parties to what the apparent legislative purpose was in New Jersey in 1980 when the windfall profit tax was enacted by Congress.

The net income provision was added to the corporation business tax in 1958. *F. W. Woolworth Co. v. Taxation Division Director*, 45 *N.J.* 466, 473 (1965). The crucial words in the present case were added to the corporation business tax at that time. *L.* 1958, *c.* 63, § 1. Much of the argument of the parties centers around the intent of the Legislature in 1958, but that argument is not very helpful. Since the Crude Oil Windfall Profit Tax Act of 1980 had obviously not been enacted as of then, the Legislature certainly did not intend in 1958 to deal specifically with this federal tax. This does not mean, however,

that the Legislature was oblivious to the significance of the windfall profit tax when it was enacted in 1980.

The parties have briefed the court exhaustively on the executive and congressional response in the 1970's to the actions of the Organization of Petroleum Exporting Countries (OPEC) in exercising their power to control the prices of crude oil in the international marketplaces. According to commentators, the windfall profit tax represented the climax of an intense, seven-year debate on national oil policy which raised an issue as to the appropriate distribution of the increased revenues expected to be derived by domestic oil producers as a result of OPEC's actions. Drapkin and Verleger, *The Windfall Profit Tax: Origins, Development, Implications*, 4 *B.C.L. Rev.* 631, 633 (1981).

There is no need to dwell on the history or the intricacies of the windfall profit tax. It will suffice to say that the American public was acutely aware of and immediately affected by the oil crisis of the early 1970's. The court takes judicial notice not only that petroleum products were in such short supply that government rationing was necessary, but also that retail prices of petroleum products reached levels previously unimagined in this country. In the face of these compelling circumstances, President Carter proposed the enactment of a windfall profit tax in conjunction with the gradual lifting of federal price controls on crude oil and refined petroleum products. In his televised address to the nation in which he made this proposal on. April 5, 1979, President Carter said:

> I want to emphasize that this windfall profits tax is not a tax on the American people. It is purely and simply a tax on the new profits of the oil producers which they will receive but not earn. [15 *Weekly Comp.* Pres. Docs. 611 (April 5, 1979).]

Conscientious State legislators could have been mindful at that time of the possibility that enactment of the windfall profit tax act might have some impact on state revenues. Had they been concerned, they would have reviewed the language

of the corporation business tax pertaining to the net income of corporations. In doing so, they would have been reminded that since 1958 corporations had been assessed a corporation business tax in part on the basis of "total net income from all sources, whether within or without the United States, . . . determined without the . . . deduction . . . of . . . [t]axes paid or accrued to the United States *on or measured by profits or income* . . .," *N.J.S.A.* 54:10A-4(k)(2)(C); emphasis supplied.

I am entirely satisfied, from the ordinary meaning of these words and from the public perception of the purpose of the windfall profit tax, that the legislators would have been reassured that no amendment of the statutory language was needed to protect the State's revenue source. The Legislature could hardly have been more precise in 1979 than it had been in 1958 to make clear that plaintiffs could not deduct the windfall profit tax when making their determination of entire net income pursuant to *N.J.S.A.* 54:10A-4(k)(2)(C).

Plaintiffs offer a prodigious amount of scholarly analysis to argue that the windfall profit tax is not, in fact, a tax on profits or income and that the name of the tax is a misnomer. Be that as it may, the point is that the Legislature surely perceived the windfall profit tax to be a tax on profits or income and felt no need to amend the corporation business tax for that very reason. One cannot expect the Legislature to have a command of "the complex and often tortuous federal statutory scheme" of taxation. *See Fedders Financial Corp. v. Taxation Division Director*, 96 *N.J.* at 405 (Handler, J., dissent).

For this very straightforward reason, I hold that the Legislature in 1979 intended to include the Crude Oil Windfall Profit Tax Act of 1980 within the term "[t]axes paid or accrued to the United States on or measured by profits or income" as stated in *N.J.S.A.* 54:10A-4(k)(2)(C). Accordingly, plaintiffs were not entitled to deduct their windfall profit tax obligations in determing their entire net income for 1980.

Plaintiffs contend that this conclusion creates various constitutional problems, primarily under the Commerce Clause, the Equal Protection and Due Process Clauses, and the Supremacy Clause of the United States Constitution. However, as the Attorney General observes, the premise of plaintiff's constitutional arguments is wrong. Plaintiffs allege that this decision means that the net income tax base varies among corporate taxpayers, but the question here is only whether plaintiffs may claim a deduction from their net income tax base, not whether there should be an addition to that portion of the tax base. This decision has no effect on the character of the income included in the tax base.

As a corollary of this, it is also incorrect for plaintiffs to argue that federal law determines the amount of a taxpayer's entire net income under the Corporation Business Tax Act. I subscribe fully to the construction of the act by Judge Andrew of this court, who has said:

> There is no support for the proposition that federal income tax concepts are the definitional source of the terms utilized in the New Jersey Act.
>
> * * * *
>
> While the starting point for determination of entire net income under the act is taxable income, before net operating loss deductions and special deductions, which the taxpayer is required to report for federal income tax purposes, the Corporation Business Tax deviates from the federal tax by providing its own inclusions and exclusions from the tax base. *N.J.S.A.* 54:10A-4(k). Only at the initial point is it indicated that the Legislature intended that federal standards were to be controlling. [*International Flavors and Fragrances v. Taxation Division Director*, 5 *N.J. Tax* 617, 624 (Tax Ct. 1983), aff'd *o.b.* ____ *N.J. Super.* ____ (App. Div. 1984).

The 1980 deficiency assessments of the Director are therefore affirmed. The Clerk of the Tax Court shall enter appropriate judgments.

Appendix D

Opinion of the Tax Court of New Jersey
Denying Reconsideration
(February 14, 1985)

TAX COURT OF NEW JERSEY

DOCKET NOS. CB 064B-83, CB 065B-83, CB 066B-83, CB 067B-83, CB 068B-83 CB 069B-83, CB 070B-83 CB 071B-83, CB 072B-83, CB 073B-83, CB 074B-83 CB 075B-83, CB 077B-83, CB 128B-83

AMERADA HESS CORPORATION, ATLANTIC RICHFIELD COMPANY, CONOCO INC., CITIES SERVICE COMPANY, EXXON CORPORATION, PHILLIPS PETROLEUM COMPANY, CHEVRON U.S.A. INC., MOBIL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, SHELL OIL COMPANY, DIAMOND SHAMROCK CORPORATION, TENNECO OIL COMPANY, and TEXACO, INC.,
Plaintiffs,

—v.—

DIRECTOR, DIVISION OF TAXATION,
Defendant.

Decided February 14, 1985

LARIO, *J.T.C.*

This is a consolidated motion filed by all plaintiffs for reconsideration of summary judgments entered by this court dismissing all plaintiffs' complaints. Plaintiffs, 14 taxpayers, originally filed complaints attacking determinations of defendant, Director, Division of Taxation (Director) whereby he

denied their respective claims for deductions under the New Jersey Corporation Business Tax Act, *N.J.S.A.* 54:10A-1, *et seq.* (CBT).

These complaints were assigned to Hon. Richard M. Conley for hearing and determination. By reason of their identity of legal issues, they were consolidated for hearing and since the material facts were not in dispute, cross motions for summary judgment were filed by all parties. In support of their respective motions, comprehensive pleadings, including thousands of pages of briefs, transcripts of depositions and affidavits were submitted by all parties and oral arguments were presented.

On September 28, 1984, Judge Conley issued his decision granting in each case defendant's motion for summary judgment affirming the deficiency assessments imposed against each of the plaintiffs by defendant. Judgments to that effect as to all assessments levied for the taxable year 1980 were entered on October 5, 1984. Subsequently, corrected judgments were entered on October 16, 1984 as to five of the plaintiffs whose assessments for the taxable year 1981 were also contested.

Thereafter, within the time period permitted by our rules, all plaintiffs joined in motions for reconsideration. Shortly after rendering his decision, Judge Conley resigned as a judge of this court to resume his private practice of law and these motions were assigned to me to hear and determine.

In its brief opposing plaintiffs' motions the Director agrees with a request contained in plaintiffs' brief that the contested assessments in Docket Nos. CB 075B-83 (Conoco, Inc.) and CB 069B-83 (Atlantic Richfield Company) (tax year 1980 only) were reductions of refund claims, not deficiency assessments, and he joins in plaintiffs' request that these judgments be corrected accordingly. This motion is granted and the Clerk of the Tax Court is directed to issue further corrected judgments to comply therewith.

Plaintiffs filed their motions pursuant to *R.* 4:49-1, *R.* 4:49-2, *R.* 4:50-1(f), *R.* 8:7(a) and *R.* 8:10, for the following relief: (i) reconsideration of the opinion of the Tax Court dated September 28, 1984, denying the motions of the plaintiffs for summary judgment, granting the motion of the defendant for

summary judgment and dismissing the complaints of the plaintiffs; (ii) vacation of the judgment and corrected judgments dated October 5, 1984 and October 16, 1984 respectively, entered pursuant thereto, affirming the 1980, and, as applicable, 1981 assessments, and dismissing the complaints of the plaintiffs; and, (iii) entry of summary judgments in favor of the plaintiffs for the relief requested in their respective complaints.

In his answering brief, defendant denies *R.* 4:50-1(f), *R.* 8:7(a) and *R.* 8:10 are applicable for this type of motion. At oral argument plaintiffs agreed with Director's contentions and stated that they were relying upon *R.* 4:49-1 and-2 for the relief requested and that the other rules cited were not applicable.

R. 4:49-2 deals with a motion to "alter or amend" a judgment and it apparently covers cases such as here where no trial was held and since it sets forth no separate substantive standard, it is presumed that its standards are identical to those applicable to *R.* 4:49-1.

R. 4:49-1 specifies that in an action tried without a jury, on motion, the trial judge may open the judgment, take additional testimony, amend findings of fact and conclusions of law and direct the entry of judgment. It further provides: "The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law."

Although the "miscarriage of justice" standard refers to jury trials, it is clear that the standard also applies to motions in non-jury cases. *Quick Check Food Stores v. Springfield Tp.* 83 N.J. 438, 445 (1980). Under this rule motions "are addressed to the sound discretion of the trial court and [the judgment] will not be disturbed unless that discretion has been clearly abused." *Id.* at 445-446.

The Supreme Court in *Quick Check* also makes it clear that the parallel Federal rule (*Fed. R. Civ. P.* 59) may be considered as a guide for interpreting *R.* 4:49-1. *Id.* at 446. The Federal rule mandates that a motion for a new trial should be premised only upon a "manifest error of law", "manifest error of fact",

or "newly discovered evidence." II Wright and Miller, Federal Practice Procedure: Civil 37, § 2804, *Pioneer Paper Stock Co. v. Miller Transport Co.*, 109 *F. Supp.* 502, 504 (D.N.J. 1983).

From an examination of the reasons advanced in support of their motions it appears that plaintiff's main objections appear to be their dissatisfaction with the judge's written opinion. Most of their arguments raised in their supporting brief and presented orally are directed against the opinion's content, brevity and its failure to discuss certain issues and not against the judge's conclusion and final judgment. They complain of the court's alleged failure to comment upon most of the evidence submitted and to address many of the arguments presented.

Plaintiffs advise that regardless of which party prevails in this court, an appeal will be taken to the Appellate Division and probably pursued to the Supreme Court. One of the objections in support of this motion raised by one of the plaintiffs is that although their positions were fully presented and exhaustively briefed, each was not specifically discussed and commented upon in the opinion; and, that on appeal, this failure is not fair to the plaintffs or to the Appellate Division. The basis for this position was that even though the Appellate court would have the benefit of the record and appellate briefs, to require the Appellate judges to examine these volumnious pleadings and to consider "all the merits from scratch" would be an imposition upon the Appellate Division who are "overworked" and entitled to the full benefits of the Tax Court's expertise which would have appeared in a much more comprehensive and detailed opinion.

This position as a basis for a reconsideration is completely unsupported by any legal authority. It is clear that issues may not be taken from opinions; they may be taken only from judgments. *R.* 2:2-3(1). As declared by our Supreme Court, "He [the appellant] voices dissatisfaction with the opinion of the Appellate Division. Appeals, however, are taken from judgments and not from opinions," *Hughes v. Eisner*, 8 *N.J.* 228, 229 (1951), and as followed by our Appellate Division: "It has long and invariably been recognized, in particular, that no

appeal lies from opinions or from written oral conclusions of courts, but only from judgment or orders." *Credit Bureau Collection Agency v. Lind*, 71 *N.J. Super.* 326, 328 (App. Div. 1961), *Melhame v. Demarest Boro.*, 174 *N.J. Super.* 28, 31 (App. Div. 1980) *C.f. Seabrook Co. v. Beck*, 174 *N.J.* Super. 577, 584 (App. Div. 1980). Appeals are taken from judgments not opinions and . . . a respondent can argue any point on the appeal to sustain the trial court's judgment. *State v. Siciliano*, 21 N.J. 249, 260 (1956)." *Chimes v. Oritano Motor Hotel, Inc.* 195 *N.J. Super* 435, 443 (App. Div. 1984).

In deciding a motion for summary judgment, where as here, the material facts are not in dispute, the trial judge should concisely and lucidly identify the legal issues involved and give a clear pronouncement of the ultimate conclusion and reasons therefor. This Judge Conley has done. It was neither required nor necessary for the court to have discussed at length and responded to all of the many issues and principles of law raised in the parties' extensive briefs where, as here, only one narrow legal issue (albeit important) was determined by the court to exist. Once having determined the issue to be decided, only such essential facts, reasoning and conclusions as applied by him to that particular issue were required to be documented. I hold that plaintiffs' objections to the format, brevity and alleged omissions of the opinion have no merit on a motion for a new trial and do not warrant further consideration.

Since the motions do not allege a "manifest error of fact" and they are not based upon an evidence question, as are usually the basis of motions under this rule, in order for a reconsideration motion to be granted under *R.* 4:49-1, it must be established clearly and convincingly that the trial judge's conclusion was based upon a "manifest error of law" which will result in a "miscarriage of justice".

Since the "miscarriage of justice" standard applies to non-jury actions it is also applicable to completed non-jury actions reassigned to another trial judge such as occurred here. However, it is manifest that in considering this motion, I am not sitting as an appellate court. I am on the same judicial level as the original trial judge; therefore, I may not substitute my

interpretation of the Legislature's intent for his. The test is not whether I would have arrived at a different conclusion had I heard the matter initially.

Plaintiffs concede the dispute between the parties is, as stated by Judge Conley: ". . . whether in computing their entire net income on which the New Jersey Corporation Business Tax is in part assessed, these taxpayers may exclude or deduct the amount of any taxes paid or accrued to the federal government under the Crude Oil Windfall Profit Tax Act of 1980, 94 *Stat.* 229, 26 U.S.C.A. §§ 4986-4997." (Slip opinion at 2); and, that he correctly concluded that the resolution thereof is controlled by the statutory construction of the seven words of section (C): "Taxes paid or accrued to the United States *on or measured by profits or income* . . ." as contained in the definition of "Entire Net Income" found in *N.J.S.A.* 54:10A-4(k) (2)(C)." (Slip opinion at 3; emphasis supplied)

The net income provision of this statute was added to the CBT in 1958. Since the Crude Oil Windfall Profit Tax Act (WPT) had not been enacted by Congress until 1980, in determining the Legislature's intent in adopting the statutory words in dispute, Judge Conley relied upon the principle of probable legislative intent of the 1958 Legislature had it anticipated the facts herein.

After analyzing the facts and circumstances of the situation, Judge Conley was satisifed and concluded "from the ordinary meaning" of the words in *N.J.S.A.* 54:10A-4(k)(2)(C) and "from the public perception of the purpose of the WPT" (Slip opinion at 6) that the Legislature in 1979 by not amending this section of the CBT "intended to include the Crude Oil Windfall Profit Tax Act of 1980 within the term "[t]axes paid or accured to the United States on or measured by profits or income" as stated in *N.J.S.A.* 54:10A-4(k)(2)(C)." (Slip opinion at 7).

In their motions for reconsideration plaintiffs allege that the court's final judgment is erroneous as a matter of law since

> in holding that the WPT is a tax "on or measured by profits or income" within the meaning of *N.J.S.A.* 54:10A-4(k)(2)(C), the Tax Court (i) ignored the oridinary and generally accepted meanings of the terms "income" and "profits" and their accepted senses under general tax law, as delineated by commentators and courts, both Federal and State [footnote omitted], (ii) made no mention whatsoever of the use of the terms "income" and "profits" in the definition of "entire net income" in *N.J.S.A.* 54:10A(k) and the relationship between those terms so used, and their uses in *N.J.S.A.* 54:10A4(k)(2)(C), (iii) summarily dismissed as irrelevant the only available legislative history concerning the "entire net income" base of the CBT, namely, that relating to the objective of our Legislature in adding that base to the CBT in 1958, and (iv) disavowed any felt need to even consider the nature and structure of the WPT, much less "the intricacies" of that tax. [Plaintiffs' brief at 3-4]

In arriving at his conclusion on the first error alleged by (i) above, the judge reasoned that it was not determinative whether the WPT *was in fact* a tax on or measured by profits or income; but instead what the Legislature perceived it to be. Plaintiffs have failed to submit any legal authority (and this court's extensive research has also failed to disclose any) to establish that Judge Conley's analysis of the Legislature's intention on this issue is clearly erroneous as a matter of law.

Plaintiffs further claim that the trial judge's reliance on the principle of "probable legislative intent" and utilizing "legislative silence" in his analysis and interpretation of the CBT constitutes error as a matter of law. They state that the court's determination of what was the 1979 and 1980 Legislature's probable intent on this issue is unsupported by legal authority.

Statutory words cover many diverse instances which cannot be foreseen, therefore, their interpretation is necessarily an imaginative projection of the express purposes upon situations arising later for which the legislature did not expressly provide. As expressed by Professor Walker Gibson, a member of the faculty of the Seminar for Appellate Judges, New York University:

> In the case of the legislature's intention the difficulty is that time has gone barreling on long after the legislature has spoken, and new situations have arisen about which the legislature clearly never had any intention at all. The question then becomes rephrased into something like, "What would the legislature have intended *if* the legislature had known what was going to happen?" Gibson, *Literary Minds and Judicial Styie* 36 *N.Y.U.L. Rev.* 915, 920 (1961).

When the judiciary is called upon to interpret the meaning of a statute in such a situation, it does not substitute its will for the legislative will but rather in the consideration of all the material elements reaches the result probably intended by the legislature. *Dorkin v. Dover Tp.*, 29 *N.J.* 303, 315 (1959). The statutory construction required thereby is referred to as "probable legislative intent." The application of this doctrine was recently set forth by our Supreme Court in *AMN, Inc. v. S. Brunswick Tp. Rene Leveling Bd.*, 93 *N.J.* 518 (1983) as follows:

> Generally, a court's duty in construing a statute is to determine the intent of the Legislature. In cases such as this, where it is clear that the drafters of a statute did not consider or even contemplate a specific situation, this Court has adopted as an established rule of statutory construction the policy of interpreting the statute "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand.' " [citations omitted] Such an interpretation will not "turn on literalisms, technisms or the so-called rules of interpretation; [rather] it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." *J.C. Chap. Prop. Owner's*, 55 *N.J.* at 100 [at 525].

Judge Conley, after analyzing what he perceived to be the "commonsense of the situation" interpreted the Legislature's failure to amend our CBT after the Federal enactment of WPT

as an indication by our Legislature that "it perceived the windfall profit tax to be a tax on profits or income and felt no need to amend the Corporation Business Tax for that very reason." (Slip opinion at 7).

In further criticizing the trial judge's interpretation of the Legislature's probable intent, plaintiffs allege that the "significance attributed by the court to Legislative inactivity" is "flatly inconsistent with binding precedent." I do not find that the decisions cited so hold. In each of the cases presented by plaintiff, no definite judicial interpretation or legislative act intervened between the adoption of the statute being interpreted and the claimed legislative silence. In such situations, as plaintiffs have correctly stated, our courts have held there is nothing to which the Legislature could acquiesce; but, in the case under review, the trial court found as a fact that there was something definite to which the New Jersey Legislature could have reacted—the federal enactment of the WPT. This distinction is pointed out in *White v. N. Bergen Tp.*, 77 *N.J.* 538, 555 (1978). In arriving at his finding concerning the Legislature inaction, Judge Conley explicitly considered the wide publicity given to the adoption of the WPT.

In *White, supra*, Chief Justice Hughes also made it clear that although Legislative silence is not conclusive, it may be significant. *Id.* at 555. In reaching his final conclusion of the intent of the 1955 Legislature, Judge Conley did not accept the 1979-1980 Legislature's silence as conclusive but instead took it into consideration in interpreting that intent.

Plaintiffs disagree with the significance and reliance that the trial court placed upon the Legislature's inactivity on this subject and the court's reasoning and conclusions as to the 1955 Legislature's probable intent; they claim it to be erroneous. However, whether or not it is erroneous and subject to reversal by our appellate court is not the test before me. As previously posited: Is it, as required by *R.* 4:49-1 and interpreted by *Quick Check, supra*, clearly and convincingly a manifest error as a matter of law? Plaintiffs have cited many cases which they claim to support their position but I find from an analysis of each that none supports their claim that Judge

Conley's judicial interpretation of the Legislature's silence and probable intent is incorrect as a matter of law.

It is recognized that trial court judges are not infallible and on appeal their orders and judgments may be reversed and, at times, the reversal is reversed. Strictly, every reversal by an upper court is a determination that the lower court's conclusion constituted an error as a matter of law; however, every erroneous conclusion is not necessarily clear or a "manifest" error. Manifest is defined as "1. readily perceived by the sight; 2. easily understood or recognized by the mind: obvious." Webster's New Collegiate Dictionary, 724 (9th ed. 1983).

The precise legal issue presented to the trial court had never before been passed upon by a court of record in this State; therefore, there exists no guiding prior determination. Judge Conley was required to examine the statute, dissect and analyze its meaning and conclude the intent of the seven words in issue. Based upon his analysis of the statute, Judge Conley concluded that plaintiffs were not entitled to deduct their WPT obligations in determining their entire net income. Plaintiffs disagree with his conclusion.

Since there has been no prior court decision on this issue, it cannot be said that his conclusion is clearly a manifest error as a matter of law. Whether, on appeal, our appellate courts will ultimately affirm Judge Conley's judgment is a matter for future determination. It has often been said in judicial circles that "an occupational hazard of a judge is that he may be wrong" but that wrong does not necessarily constitute "manifest error." As aptly stated by Judge Charles M. Merrill of the Ninth Circuit, United States Court of Appeals:

> To an appellate judge, dealing with principles of law rather than with physical facts, what is "right" and what is "wrong" is largely a question of opinion. There is very little that is absolute. When one is declared "wrong" by a majority of one's brothers or by a higher court it can often be said simply that there is a difference of opinion. Personally I do not see why any greater opprobruim should attend reversal by a higher court than attends the

> filing of a dissenting opinion. In either case all that is revealed is that opinions differ and that upon this difference one is in the minority. And whenever there is difference someone must be in the minority; and if there were no room for difference there would be little need for appellate courts. Merrill, *Some Reflections on the Business of Judging*, 40 J. State Bar of Calif. 811-812-13, 814 (1965)

I conclude that plaintiffs have failed to establish the existence of either a manifest error of law or a miscarriage of judtice as required by *R.* 4:49.1 or 2. Motions for reconsideration are denied.

Appendix E

Notice of Appeal to the Supreme Court of the United States on behalf of Texaco Inc.

[Filed August 21, 1987—Supreme Court of New Jersey]

IN THE SUPREME COURT OF
THE STATE OF NEW JERSEY

DOCKET NO. 25,265

Civil Action

TEXACO INC.,

Appellant,

—vs.—

DIRECTOR, DIVISION OF TAXATION,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Texaco Inc., the Appellant above-named, HEREBY APPEALS to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey entered in this action on June 22, 1987, reversing the judgment of the New Jersey Superior Court, Appellate Division, and reinstating the judgment of the New Jersey Tax Court (i) denying the motion of Appellant for summary judgment, (ii) granting the cross-motion of Appellee for summary judgment and, pursuant thereto, (iii) dismissing the complaint of Appellant.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

CARPENTER, BENNETT & MORRISSEY

By: /s/ LAURENCE REICH

Laurence Reich
Counsel for Appellant
Texaco Inc.
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07201
(201) 622-7711

Dated: August 21, 1987

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that:

1. The original of the within Notice of Appeal has been filed with the Clerk of the Supreme Court of the State of New Jersey, the court from whose judgment this appeal is taken and the court possessed of the record in this matter.

2. Copies of the within Notice of Appeal have been served personally upon (i) the Honorable John R. Baldwin, Director of the Division of Taxation, New Jersey Department of the Treasury, 50 Barrack Street, CN-269, Trenton, New Jersey 08646, (ii) the Honorable W. Cary Edwards, Attorney General of the State of New Jersey, Richard J. Hughes Justice Complex, CN-112, Trenton, New Jersey 08625, (iii) Charles M. Costenbader, Esq., of Stryker, Tams & Dill, 33 Washington Street, Newark, New Jersey 07102, counsel for Shell Oil Co., Atlantic Richfield Co., Gulf Oil Corp., Union Oil Co. of California, Mobil Oil Corp., Chevron U.S.A. Inc., Phillips Petroleum Co., Exxon Corp., Cities Service Co., Conoco Inc., and Diamond Shamrock Corp., plaintiffs-respondents in eleven related New Jersey Supreme Court appeals (Docket Nos. 25,267 through 25,277), and (iv) Frederic K. Becker, Esq., of Wilentz, Goldman & Spitzer, 900 Route 9, Box 10, Woodbridge, New Jersey 07095, counsel for Amerada Hess Corpora-

tion, plaintiff-respondent in a related New Jersey Supreme Court appeal (Docket No. 25,264).

3. The filing fee of $5.00, as required by N.J.S.A. 22A:2, has been paid by check accompanying the within Notice of Appeal.

4. All parties required to be served with copies of the within Notice of Appeal have been served.

I further certify that the foregoing statements made by me are true. I am aware that if any of those statements are wilfully false, I am subject to punishment.

CARPENTER, BENNETT & MORRISSEY

/s/ LAURENCE REICH
Laurence Reich
Counsel for Appellant,
Texaco Inc.

Dated: August 21, 1987

Exhibit E

Notice of Appeal to the Supreme Court of the United States on behalf of Tenneco Oil Company

[Filed August 21, 1987—Supreme Court of New Jersey]

IN THE SUPREME COURT OF
THE STATE OF NEW JERSEY

DOCKET NO. 25,266

Civil Action

TENNECO OIL COMPANY,
Appellant,

—vs.—

DIRECTOR, DIVISION OF TAXATION,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Tenneco Oil Company, the Appellant above-named, HEREBY APPEALS to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey entered in this action on June 22, 1987, reversing the judgment of the New Jersey Superior Court, Appellate Division, and reinstating the judgment of the New Jersey Tax Court (i) denying the motion of Appellant for summary judgment, (ii) granting the cross-motion of Appellee for summary judgment and, pursuant thereto, (iii) dismissing the complaint of Appellant.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

CARPENTER, BENNETT & MORRISSEY

By: /s/ LAURENCE REICH

Laurence Reich
Counsel for Appellant
Texaco Inc.
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07201
(201) 622-7711

Dated: August 21, 1987

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that:

1. The original of the within Notice of Appeal has been filed with the Clerk of the Supreme Court of the State of New Jersey, the court from whose judgment this appeal is taken and the court possessed of the record in this matter.

2. Copies of the within Notice of Appeal have been served personally upon (i) the Honorable John R. Baldwin, Director of the Division of Taxation, New Jersey Department of the Treasury, 50 Barrack Street, CN-269, Trenton, New Jersey 08646, (ii) the Honorable W. Cary Edwards, Attorney General of the State of New Jersey, Richard J. Hughes Justice Complex, CN-112, Trenton, New Jersey 08625, (iii) Charles M. Costenbader, Esq., of Stryker, Tams & Dill, 33 Washington Street, Newark, New Jersey 07102, counsel for Shell Oil Co., Atlantic Richfield Co., Gulf Oil Corp., Union Oil Co. of California, Mobil Oil Corp., Chevron U.S.A. Inc., Phillips Petroleum Co., Exxon Corp., Cities Service Co., Conoco Inc., and Diamond Shamrock Corp., plaintiffs-respondents in eleven related New Jersey Supreme Court appeals (Docket Nos. 25,267 through 25,277), and (iv) Frederic K. Becker, Esq., of Wilentz, Goldman & Spitzer, 900 Route 9, Box 10, Woodbridge, New Jersey 07095, counsel for Amerada Hess Corporation, plaintiff-respondent in a related New Jersey Supreme Court appeal (Docket No. 25,264).

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4. All parties required to be served with copies of the within Notice of Appeal have been served.

I further certify that the foregoing statements made by me are true. I am aware that if any of those statements are wilfully false, I am subject to punishment.

CARPENTER, BENNETT & MORRISSEY

/s/ LAURENCE REICH

Laurence Reich
Counsel for Appellant
Tenneco Oil Company

Dated: August 21, 1987

Appendix F

Constitutional Provisions and Statutes Involved

1. Relevant provisions of the *Constitution of the United States*.

Article I, Section 8, Clause 3 ("Commerce Clause"):

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes . . . .

Amendment XIV, Section 1 ("Due Process Clause" and "Equal Protection Clause"):

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Relevant Provisions of the *New Jersey Corporation Business Tax Act (1945)*, as amended, N.J. Stat. Ann. §§ 54:10A *et seq.* (West 1986):

N.J. Stat. Ann. § 54:10A-4 (West 1986):

> For the purposes of this act, unless the context requires a different meaning:
>
> . . . .
>
> (k) "Entire net income" shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a

> taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its federal income tax; provided, however, that in the determination of such entire net income,
>
> . . . .
>
> (2) Entire net income shall be determined without the exclusion, deduction or credit of:
>
> . . . .
>
> (C) Taxes paid or accrued to the United States on or measured by profits or income . . . .
>
> . . . .

N.J. Stat. Ann. § 54:10A-5 (West 1986):

> The franchise tax to be annually assessed to and paid by each taxpayer shall be the sum of the amount computed under subsection (a) hereof, or in the alternative to the amount computed under subsection (a) hereof, the amount computed under subsection (f) hereof, and the amount computed under subsection (c) hereof:
>
> . . . .
>
> (c) 3¼% of its entire net income or such portion as may be allocated to this State as provided in section 6; provided, however, . . . that with respect to reports covering accounting or privilege periods or parts thereof ending after December 31, 1979, the rate shall be 9%.
>
> . . . .

N.J. Stat. Ann. § 54:10A-6 (West 1986):

> In the case of a taxpayer which maintains a regular place of business outside this State other than a statutory office, the portion of its entire net worth to be used as a measure of the tax imposed by section 5(a) of this act, and the portion of its entire net income to be used as a

measure of the tax imposed by section 5(c) of this act, shall be determined by multiplying such entire net worth and entire net income, respectively, by an allocation factor which shall be the average of the fractions computed in (A), (B) and (C) below, or of so many of them as may be applicable, that is:

(A) The average value of the taxpayer's real and tangible personal property within the State during the period covered by its report divided by the average value of all the taxpayer's real and tangible personal property wherever situated during such periods . . . .

(B) The receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its net income for federal purposes, arising during such periods from

(1) sales of its tangible personal property located within this State at the time of the receipt of or appropriation to the orders where shipments are made to points within the State,

(2) sales of tangible personal property located without the State at the time of the receipt of or appropriation to the orders where shipment is made to points within the State,

(3) (Deleted by amendment.)

(4) services performed within the State,

(5) rentals from property situated, and royalties from the use of patents or copyrights, within the State,

(6) all other business receipts (excluding dividends excluded from entire net income by subsection (k)(1) of section 4 hereof) earned within the State, divided by the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services,

rentals, royalties and all other business receipts, whether within or without the State.

. . .

(C) The total wages, salaries and other personal service compensation, similarly computed, during such period of officers and employees within the State divided by the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's officers and employees within and without the State.

. . .

3. Relevant Provisions of the *Crude Oil Windfall Profit Tax Act of 1980*, 26 U.S.C. §§ 4986 *et seq.*:

26 U.S.C. § 4986:

(a) IMPOSITION OF TAX—An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period.

(b) TAX PAID BY PRODUCER—The tax imposed by this section shall be paid by the producer of the crude oil.

26 U.S.C. § 4987:

(a) IN GENERAL—The amount of tax imposed by section 4986 with respect to any barrel of taxable crude oil shall be the applicable percentage of the windfall profit on such barrel.

(b) APPLICABLE PERCENTAGE—For purposes of subsection (a)—

(1) GENERAL RULE FOR TIERS 1 AND 2.—The applicable percentage for tier 1 oil and tier 2 oil which is not independent producer oil is—

Tier 1 70
Tier 2 60

measure of the tax imposed by section 5(c) of this act, shall be determined by multiplying such entire net worth and entire net income, respectively, by an allocation factor which shall be the average of the fractions computed in (A), (B) and (C) below, or of so many of them as may be applicable, that is:

(A) The average value of the taxpayer's real and tangible personal property within the State during the period covered by its report divided by the average value of all the taxpayer's real and tangible personal property wherever situated during such periods . . . .

(B) The receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its net income for federal purposes, arising during such periods from

(1) sales of its tangible personal property located within this State at the time of the receipt of or appropriation to the orders where shipments are made to points within the State,

(2) sales of tangible personal property located without the State at the time of the receipt of or appropriation to the orders where shipment is made to points within the State,

(3) (Deleted by amendment.)

(4) services performed within the State,

(5) rentals from property situated, and royalties from the use of patents or copyrights, within the State,

(6) all other business receipts (excluding dividends excluded from entire net income by subsection (k)(1) of section 4 hereof) earned within the State, divided by the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services,

rentals, royalties and all other business receipts, whether within or without the State.

. . .

(C) The total wages, salaries and other personal service compensation, similarly computed, during such period of officers and employees within the State divided by the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's officers and employees within and without the State.

. . .

3. Relevant Provisions of the *Crude Oil Windfall Profit Tax Act of 1980*, 26 U.S.C. §§ 4986 *et seq.*:

26 U.S.C. § 4986:

(a) IMPOSITION OF TAX—An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period.

(b) TAX PAID BY PRODUCER—The tax imposed by this section shall be paid by the producer of the crude oil.

26 U.S.C. § 4987:

(a) IN GENERAL—The amount of tax imposed by section 4986 with respect to any barrel of taxable crude oil shall be the applicable percentage of the windfall profit on such barrel.

(b) APPLICABLE PERCENTAGE—For purposes of subsection (a)—

(1) GENERAL RULE FOR TIERS 1 AND 2.—The applicable percentage for tier 1 oil and tier 2 oil which is not independent producer oil is—

Tier 1 70
Tier 2 60

(2) INDEPENDENT PRODUCER OIL.—The applicable percentage for independent producer oil which is tier 1 oil or tier 2 oil is—

Tier 1 50
Tier 2 30

(3) TIER 3 OIL.—The applicable percentage for tier 3 oil is 30 percent.*

26 U.S.C. § 4988:

(a) GENERAL RULE—For purposes of this chapter, the term "windfall profit" means the excess of the removal price of the barrel of crude oil over the sum of—

(1) the adjusted base price of such barrel, and

(2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c).

(b) NET INCOME LIMITATION ON WINDFALL PROFIT—

(1) IN GENERAL—The windfall profit on any barrel of crude oil shall not exceed 90 percent of the net income attributable to such barrel.

(2) DETERMINATION OF NET INCOME—For purposes of paragraph (1), the net income attributable to a barrel shall be determined by dividing—

(A) the taxable income from the property for the taxable year attributable to taxable crude oil, by

(B) the number of barrels of taxable crude oil from such property taken into account for such taxable year.

. . . .

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* For taxable years beginning after December 31, 1981, 26 U.S.C. § 4987(b)(3) has been amended to provide a percentage rate for "newly discovered" tier 3 oil of 27½% for 1982, decreasing to 15% for 1989 and thereafter.

(C) REMOVAL PRICE—For purpose of this chapter—

(1) IN GENERAL—except as otherwise provided in this subsection, the term "removal price" means the amount for which the barrel is sold.

(2) SALES BETWEEN RELATED PERSONS—In the case of a sale between related persons (within the meaning of section 144(a)(3), the removal price shall not be less than the constructive sales price for purposes of determining gross income from the property under section 613.

(3) OIL REMOVED FROM PREMISES BEFORE SALE—If crude oil is removed from the premises before it is sold, the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

(4) REFINING BEGUN ON PREMISES—If the manufacture or conversion of crude oil into refined products begins before such oil is removed from the premises—

(A) such oil shall be treated as removed on the day such manufacture or conversion begins, and

(B) the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

(5) MEANING OF TERMS—The terms premises and "refined product" have the same meaning as when used for purposes of determining gross income from the property under section 613.

26 U.S.C. § 4989(a):

(a) ADJUSTED BASE PRICE DEFINED—For purposes of this chapter, the term "adjusted base price" means the base price for the barrel of crude oil plus an amount equal to—

(1) such base price, multiplied by

(2) INDEPENDENT PRODUCER OIL.—The applicable percentage for independent producer oil which is tier 1 oil or tier 2 oil is—

Tier 1 50
Tier 2 30

(3) TIER 3 OIL.—The applicable percentage for tier 3 oil is 30 percent.*

26 U.S.C. § 4988:

(a) GENERAL RULE—For purposes of this chapter, the term "windfall profit" means the excess of the removal price of the barrel of crude oil over the sum of—

(1) the adjusted base price of such barrel, and

(2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c).

(b) NET INCOME LIMITATION ON WINDFALL PROFIT—

(1) IN GENERAL—The windfall profit on any barrel of crude oil shall not exceed 90 percent of the net income attributable to such barrel.

(2) DETERMINATION OF NET INCOME—For purposes of paragraph (1), the net income attributable to a barrel shall be determined by dividing—

(A) the taxable income from the property for the taxable year attributable to taxable crude oil, by

(B) the number of barrels of taxable crude oil from such property taken into account for such taxable year.

. . . .

---

* For taxable years beginning after December 31, 1981, 26 U.S.C. § 4987(b)(3) has been amended to provide a percentage rate for "newly discovered" tier 3 oil of 27½% for 1982, decreasing to 15% for 1989 and thereafter.

(C) REMOVAL PRICE—For purpose of this chapter—

(1) IN GENERAL—except as otherwise provided in this subsection, the term "removal price" means the amount for which the barrel is sold.

(2) SALES BETWEEN RELATED PERSONS—In the case of a sale between related persons (within the meaning of section 144(a)(3), the removal price shall not be less than the constructive sales price for purposes of determining gross income from the property under section 613.

(3) OIL REMOVED FROM PREMISES BEFORE SALE—If crude oil is removed from the premises before it is sold, the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

(4) REFINING BEGUN ON PREMISES—If the manufacture or conversion of crude oil into refined products begins before such oil is removed from the premises—

(A) such oil shall be treated as removed on the day such manufacture or conversion begins, and

(B) the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

(5) MEANING OF TERMS—The terms premises and "refined product" have the same meaning as when used for purposes of determining gross income from the property under section 613.

26 U.S.C. § 4989(a):

(a) ADJUSTED BASE PRICE DEFINED—For purposes of this chapter, the term "adjusted base price" means the base price for the barrel of crude oil plus an amount equal to—

(1) such base price, multiplied by

(2) the inflation adjustment for the calendar quarter in which the crude oil is removed from the premises.

The amount determined under the preceding sentence shall be rounded to the nearest cent.

26 U.S.C. § 4991(a), (b):

(a) TAXABLE CRUDE OIL—For purposes of this chapter, the term "taxable crude oil" means all domestic crude oil other than exempt oil

(b) EXEMPT OIL—For purposes of this chapter, the term "exempt oil" means—

(1) any crude oil from a qualified governmental interest or a qualified charitable interest,

(2) any exempt Indian oil,

(3) any exempt Alaskan oil, and

(4) any exempt front-end oil.

26 U.S.C. § 4996(c):

(c) SEVERANCE TAX ADJUSTMENT.—For purposes of this chapter—

(1) IN GENERAL—The severance tax adjustment with respect to any barrel of crude oil shall be the amount by which

(A) any severance tax imposed with respect to such barrel, exceeds

(B) the severance tax which would have been imposed if the barrel had been valued at its adjusted base price.

(2) SEVERANCE TAX DEFINED—For purposes of this subsection, the term "severance tax" means a tax—

(A) imposed by a State with respect to the extraction of oil, and

(B) determined on the basis of the gross value of the extracted oil.

(3) LIMITATIONS—

(A) 15 PERCENT LIMITATION.—A severance tax shall not be taken into account to the extent that the rate thereof exceeds 15 percent.

(B) INCREASES AFTER MARCH 31, 1979, MUST APPLY EQUALLY.—The amount of the severance tax taken into account under paragraph (1) shall not exceed the amount which would have been imposed under a State severance tax in effect on March 31, 1979, unless such excess is attributable to an increase in the rate of the severance tax (or to the imposition of a severance tax) which applies equally to all portions of the gross value of each barrel of oil subject to such tax.

(2) the inflation adjustment for the calendar quarter in which the crude oil is removed from the premises.

The amount determined under the preceding sentence shall be rounded to the nearest cent.

26 U.S.C. § 4991(a), (b):

(a) TAXABLE CRUDE OIL—For purposes of this chapter, the term "taxable crude oil" means all domestic crude oil other than exempt oil

(b) EXEMPT OIL—For purposes of this chapter, the term "exempt oil" means—

(1) any crude oil from a qualified governmental interest or a qualified charitable interest,

(2) any exempt Indian oil,

(3) any exempt Alaskan oil, and

(4) any exempt front-end oil.

26 U.S.C. § 4996(c):

(c) SEVERANCE TAX ADJUSTMENT.—For purposes of this chapter—

(1) IN GENERAL—The severance tax adjustment with respect to any barrel of crude oil shall be the amount by which

(A) any severance tax imposed with respect to such barrel, exceeds

(B) the severance tax which would have been imposed if the barrel had been valued at its adjusted base price.

(2) SEVERANCE TAX DEFINED—For purposes of this subsection, the term "severance tax" means a tax—

(A) imposed by a State with respect to the extraction of oil, and

(B) determined on the basis of the gross value of the extracted oil.

(3) LIMITATIONS—

(A) 15 PERCENT LIMITATION.—A severance tax shall not be taken into account to the extent that the rate thereof exceeds 15 percent.

(B) INCREASES AFTER MARCH 31, 1979, MUST APPLY EQUALLY.—The amount of the severance tax taken into account under paragraph (1) shall not exceed the amount which would have been imposed under a State severance tax in effect on March 31, 1979, unless such excess is attributable to an increase in the rate of the severance tax (or to the imposition of a severance tax) which applies equally to all portions of the gross value of each barrel of oil subject to such tax.

Appendix G

Rule 28.1 Lists of Parents, Subsidiaries, and Affiliates

1. List of Subsidiaries and Affiliates of Texaco Inc.

The subsidiaries and affiliates of Texaco Inc. listed on its most recent Form 10K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Texaco Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Netherland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Chemical Company
Texaco Canada Inc.

Texaco Canada Resources Ltd.
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

2. List of Parents, Subsidiaries, and Affiliates of Tenneco Oil Company.

The parents and nonwholly-owned subsidiaries and affiliates of Tenneco Oil Company, as of August 31, 1987, are as follows:

Tenneco Inc. (Delaware)
Tenneco Corporation
FC Marine Inc. (Delaware)
Mistal, Inc. (Delaware)
TENN-USS Chemicals Finance Corporation (Delaware)
Establissement L. Bouilloux S.A. (France)
Poclain S.A. (France)
Poclain Italiana SpA (Italy)
Kern River Gas Supply Corporation (Delaware)
Kern River Service Corporation (Delaware)
Monroe Auto Pecas S.A. (Brazil)
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)
Collins Pipeline Company (Delaware)
Productora Andina de Acidos y Derivados Ltda (Columbia)
T&M Terminal Company (Delaware)
SBG Puerto Rico, Inc. (Puerto Rico)
Alcan Ekco Limited (United Kingdom)
A/S Haustrup-Ekco Aluminum-Emballage (Denmark)
Ekco S.A.R.L. (France)
Tokyo Ekco Company, Ltd. (Tokyo Ekco Kubushiki, Kaisha) (Japan)
Skogstre A/S (Norway)
Tenngasco Gas Gathering Company (Delaware—in dissolution)

Appendix G

Rule 28.1 Lists of Parents, Subsidiaries, and Affiliates

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Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Netherland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Chemical Company
Texaco Canada Inc.

Texaco Canada Resources Ltd.
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

2. List of Parents, Subsidiaries, and Affiliates of Tenneco Oil Company.

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Poclain S.A. (France)
Poclain Italiana SpA (Italy)
Kern River Gas Supply Corporation (Delaware)
Kern River Service Corporation (Delaware)
Monroe Auto Pecas S.A. (Brazil)
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)
Collins Pipeline Company (Delaware)
Productora Andina de Acidos y Derivados Ltda (Columbia)
T&M Terminal Company (Delaware)
SBG Puerto Rico, Inc. (Puerto Rico)
Alcan Ekco Limited (United Kingdom)
A/S Haustrup-Ekco Aluminum-Emballage (Denmark)
Ekco S.A.R.L. (France)
Tokyo Ekco Company, Ltd. (Tokyo Ekco Kubushiki, Kaisha) (Japan)
Skogstre A/S (Norway)
Tenngasco Gas Gathering Company (Delaware—in dissolution)

HT Gathering Company (Texas)
Oasis Pipeline Company (Delaware)
Tenneco Oil Company of Nigeria Unlimited (Nigeria)
Sara Gretes Cafeteria AB (Sweden)
Omni-Pac GmbH (Germany)
Omni-Pac S.A.R.L. (France)
P.P.M. Guindastes Hidraulicos S.A. (Brazil)
Tunisian American Date Company (Tunisia)
S.A. Paper Chemicals (Proprietary), Limited (South Africa)
Case Vibromax GmbH (Germany)
Case Vibromax GmbH and Co. (Germany)
Vibromax France SARL (France)
Vibromax SCI (France)
Omni-Pac S.A.R.L. (France)
Case Poclain GmbH & Co. (Germany)
Vibromax France SARL (France)
Vibromax SCI (France)
Case Poclain GmbH & Co. (Germany)
Depositas Del Norte, S.A. (Spain)
Terminales Quimicos S.A. (Spain)
Case Vibromax GmbH und Co. (Germany)
Albright & Wilson (Australia) Limited (Australia)
Akulu Marchon (PTY) Ltd. (South Africa)
Marchon-Paragon Sulphonation (PTY) Ltd.
Polyphosphates Inc. (Philippines)
Albright, Morarji and Pandit Limited (India)
Butler (1943) Ltd. (United Kingdom)
Intertractor Viehmann GmbH & Co. (Germany)

HT Gathering Company (Texas)
Oasis Pipeline Company (Delaware)
Tenneco Oil Company of Nigeria Unlimited (Nigeria)
Sara Gretes Cafeteria AB (Sweden)
Omni-Pac GmbH (Germany)
Omni-Pac S.A.R.L. (France)
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